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No. 01–

IN THE

Supreme Court of the United States

MICHAEL TODD BROSIUS,

Petitioner,

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

In *Burns v. Wilson*, 346 U.S. 137 (1953), this Court decided in a plurality opinion that military service members convicted at a court-martial may seek review of their convictions under the federal habeas corpus statute, 28 U.S.C. § 2441. Nearly fifty years after *Burns* and in a time when the question is of significant national importance, however, the federal courts are at odds over what *Burns* means. In the decision below, the Third Circuit held that its inquiry may go no further than its inquiry when reviewing state court convictions under 28 U.S.C. § 2254(d), a section of the Antiterrorism and Effective Death Penalty Act ("AEDPA") enacted in 1996. Accordingly, the questions presented here are:

Whether a military habeas corpus petitioner is entitled to *de novo* review of constitutional and legal issues and mixed issues of law and fact, where the facts are undisputed and the petitioner does not challenge the trial court's reasonable findings of fact; and

Whether Petitioner is entitled to habeas corpus relief under the properly applied scope of reviewing military convictions.

This is the time and the case for this Court to resolve these issues. There are more than two million Americans subject to the military justice system with the potential for others to be subject to the decisions of military tribunals. A clear standard should be articulated.

PARTIES TO THE PROCEEDINGS

The only parties to the proceeding are Petitioner Michael Todd Brosius, an individual, and his custodian at the time the Petition for a Writ of Habeas Corpus was filed, the Warden of the United States Penitentiary at Lewisburg, Pennsylvania.

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PETITION FOR A WRIT OF CERTIORARI

Michael Todd Brosius respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is reported at 278 F.3d 239. The opinion of the district court (Pet. App. 18a) is reported at 125 F. Supp. 2d 681.

The opinion of the U.S. Army Court of Military Review (Pet. App. 46a) is reported at 37 M.J. 652. The order of the U.S. Court of Military Appeals granting Brosius's petition for review and summarily affirming the conviction without opinion (Pet. App. 65a) is reported at 39 M.J. 378.

JURISDICTION

The Third Circuit entered the decision below on January 23, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal habeas corpus statute, 28 U.S.C. § 2241, provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless — . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

The portion of the habeas corpus statute, 28 U.S.C. § 2254, containing a provision enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

This case squarely presents a recurring question that is dividing the lower courts and has not been — but should be — resolved by this Court: whether federal courts should review *de novo* the merits of legal and constitutional claims in habeas corpus proceedings arising from military court-martial convictions. This case presents issues of law and is not fact-bound, because the basic facts here are undisputed.

1. Petitioner Michael Todd Brosius is serving a 75-year sentence after an Army general court-martial conviction for unpremeditated murder. At the time of his conviction, Brosius was a 24-year-old soldier who had served in the Army for four years. His conviction was based largely on statements that agents from the Army Criminal Investigation Division ("CID") obtained from him. The constitutional admissibility of those statements is the central issue in this case. Although Brosius

had admittedly been with a woman soldier in the early morning hours of the day she was killed, there was no physical or forensic evidence that tied him to the crime. Pet. App. 19a.

2. The basic law governing admissibility of the statements is clear. Federal military law requires warning of the right to remain silent for "a person suspected of an offense." *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999);[1] Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) [hereinafter UCMJ]. This warning is required even if a person is not in custody, as long as the person is a "suspect." *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000), *cert. denied*, 531 U.S. 1150 (2001). "The determination of whether a person interviewed is a suspect is a question of law." *Muirhead*, 51 M.J. at 96. In considering this question, courts use an objective standard, but courts also find that soldiers are suspects if the agents subjectively believed that they were. *Id.* Thus, soldiers are entitled to warnings if they are "suspects" under *either* the objective *or* the subjective standard.

The more familiar *Miranda* warnings of the right to remain silent *and* the right to counsel also apply to military members who are undergoing custodial interrogation. *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Here, Brosius requested counsel, but the agents provided the prosecutor to him. The issue is whether he was in "custody" when he requested counsel, another question of law that courts review *de novo* based on underlying facts. *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995). To decide this issue, courts use an objective standard. The test is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," and "the ultimate inquiry" is whether there was a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 112 (quoting *California v.*

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[1] "Court of Appeals for the Armed Forces" (C.A.A.F.) is the same court as the previously-named U.S. Court of Military Appeals.

Beheler, 463 U.S. 1121, 1125 (1983), and *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This determination is no more difficult in a military setting, but it is slightly different because soldiers may be ordered or directed to act and usually have some restrictions on movement simply by the very nature of being a soldier on a base.

Federal courts may grant a writ of habeas corpus to any prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241. This includes military prisoners. *Burns v. Wilson*, 346 U.S. 137, 139 (1953). Courts can "determine whether the military have given fair consideration to each of [the] claims" that military prisoners raise, *id.* at 144, but "when a military decision has dealt fully and fairly with an allegation raised in [the habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142.

3. There is no need for a factual re-evaluation in this case, because the facts are undisputed. During the early hours of Saturday, June 2, 1990, Private First Class Tammy Ivon was found near death on a U.S. Army base in Germany. She died from her injuries. Army CID agents began their investigation shortly after the discovery of Ivon's body.

Late Saturday afternoon, the agents were interviewing witnesses in the office of Brosius's First Sergeant, and they had their initial interview with Brosius. Brosius was ordered to attend the CID interview, because Brosius's First Sergeant "called" him to the office and "sent" him there. Pet. App. 38a, 40a. At this time, the agents had sufficient facts to regard Brosius as a suspect under the prevailing *Muirhead* objective standard.

> Before they questioned Brosius, the agents knew that the decedent had entered the base in the early morning hours of June 2 shortly before her murder, and that the gate guards had reported that only one person was with her at the time;

> Throughout their investigation on June 2, the agents were "looking aggressively for that one person" who was with the decedent;
>
> Before interviewing Brosius, the agents were in the process of verifying an alibi for another suspect;
>
> Within minutes after they began questioning Brosius, the agents knew that Brosius was the one person that they had been looking for aggressively; and
>
> Within minutes after they began questioning Brosius, they heard Brosius say there was a third person in the car, which was inconsistent with what the gate guards had reported.

See Pet. App. 24a-25a.

Brosius immediately made a request that either his First Sergeant or a lawyer be present. Instead of asking the First Sergeant to come into the office, the agents directed Brosius to go to CID headquarters (the "River Building"). At the agents' request, the First Sergeant had another Sergeant "escort" Brosius there. *Id.* 12a. The agents told Brosius that *he would be able to see a lawyer there. Id.* 21a. The agents said that the only reason they sent him to the River Building was "because that's where the attorneys were." R.146.[2]

While Brosius was being transported to the River Building, the prosecutors learned of Brosius's impending arrival and that he expected to see a lawyer. The prosecutors decided that it would be sufficient to allow Brosius to meet with the prosecutor in charge of the investigation, Captain Harper Ewing. Pet. App. 3a, 23a-24a. When Brosius arrived, he was told that an attorney was present, because "you requested one." *Id.* 29a. Ewing was introduced to him as being "from JAG," R.177, without a disclosure that Ewing had been assigned to the case as the prosecutor. Pet. App. 42a n.7. Ewing soon

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[2] Relevant portions of the transcripts of Petitioner's pretrial hearings are included in a Supplemental Appendix filed with the Third Circuit.

discovered, however, that Brosius was Ewing's client for an unrelated civil matter. Thus, Ewing took Brosius to a separate room and said that he was "working with the cops." *Id.* 4a.

Before Brosius's interview at the River Building, Ewing heard Brosius make a second request for counsel. This request was clear and unambiguous, *id.* 23a, 42a, but Brosius still did not receive his own counsel. Ewing sat with Brosius during the interview, and the result was a statement that was used against Brosius at his trial. After the interview, the agents seized Brosius's clothing and sent it to a laboratory for analysis, because they learned that it was the same clothing he was wearing when he entered the base with the decedent. *Id.* 24a.

The agents said they formed the belief the following morning that Brosius was a "suspect." They called Brosius for another interview, and they obtained a rights waiver and a "confession" from him. Certain details appearing in the statements are inconsistent with the details of the murder and the physical evidence. *Id.* 53a. The written statements are unusual in that, at the end, Brosius wrote "I don't believe I did it" and "I feel like I falsified the whole statement." *Id.* 19a. It is undisputed that during this interrogation in the absence of any attorney representing his interests, Brosius was crying and curled on the floor in a fetal position as the questioning continued. Ewing was taken off the prosecution team the next day. *Id.* 23a.

4. At his court-martial, Brosius made a motion to suppress the statements, which was denied. *Id.* 20a. Brosius argued that he was a "suspect" when agents first questioned him, entitling him to rights warnings under UCMJ art. 31(b), 10 U.S.C. § 831(b). Further, Brosius argued that he was subjected to custodial interrogation and was entitled to rights warnings under the Fifth Amendment and *Miranda*.

The military trial judge, an Army colonel, denied Brosius's motion. Pet. App. 25a. He concluded that Brosius was not a "suspect" during his questioning. He also concluded that Brosius did not request counsel, although the district court,

which denied the habeas corpus petition, reviewed the facts in the record and found that there *had* been a request for counsel. *Id.* 42a. The military judge did not reach the issue of whether Brosius was in custody.

On appeal, the Army Court of Military Review ("ACMR"), consisting of Army officers, affirmed Brosius's conviction. *Id.* 46a. ACMR has a statutory obligation to review the entire record to ensure that Brosius was lawfully convicted. The court may weigh evidence and determine disputed issues of fact. UCMJ art. 66(c), 10 U.S.C. § 866(c). ACMR was obligated to correct the trial judge's errors, including a significant error in speculating on the existence of evidence.[3] It did not do so. Instead, ACMR apparently overruled the trial judge's speculation but did not correct the error. With respect to the custody issue, ACMR stated in passing, without reviewing any evidence, that Brosius was not in custody. Pet. App. 59a. Contrary to the district court's findings here, ACMR said that Brosius had not requested counsel. *Id.*

Brosius's then petitioned for appeal to the U.S. Court of Military Appeals ("COMA"). COMA reviews appeals on a discretionary basis "on good cause shown." UCMJ art. 67(b)(3), 10 U.S.C. § 867(b)(3). COMA granted Brosius's petition and then affirmed his conviction, all on the same day in a one-sentence order. Pet. App. 65a.

5. Brosius filed his Petition for Writ of Habeas Corpus in August 1999, alleging significant violations of constitutional and statutory rights and a fundamental violation of lawyer ethical standards. The district court had jurisdiction under 28 U.S.C. § 1331. The court denied the petition. Pet. App. 45a.

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[3] The trial judge had cogently asked the Army witness what new evidence arose on day two that made Brosius a suspect which was not before them on day one when the Army said he was not a suspect. There was no answer given to this question that pointed to any new evidence. Pet. App. 24a. If, by an objective standard, Brosius should have been determined to be a suspect on day one, he should have received the required warnings.

For its scope of review, the court said it was following a four-factor analysis that the Fifth Circuit had developed in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975). Pet. App. 32a-33a. Although the court said it would review "certain mixed issues of law and fact," *id.* 33a, it actually determined only "whether the military courts gave full and fair consideration to the claim, not whether we would have made the same decision in their place." *Id.* 37a; *see also id.* 36a.[4]

Brosius raised issues that the district court did not address. The court declined to address the military judge's speculation on the existence of critical evidence to support his findings of fact. *Id.* 44a. The court also did not address the significant ethical issue relating to Ewing's participation. The lead agent described this as "walking the gray area." *Id.* 29a.

6. The Third Circuit had jurisdiction under 28 U.S.C. § 1291. The court stated that "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." Pet. App. 5a. The court also recognized that its own prior decisions on the issue were "far from seamless."[5]

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[4] Before the district court, the Army initially took the extreme position that the court could not review the results of the case beyond deciding if issues that were raised had been considered by the military courts. The district court thereafter directed the Army to brief the merits. The Army's initial position shows that it still seems to be arguing the position which was rejected in *Burns*.

[5] These two comments by the Third Circuit summarize succinctly why this Court should grant the petition for certiorari. In 1968 the Third Circuit had applied a narrow scope of review. *See United States ex rel. Thompson v. Parker*, 399 F.2d 774, 776 (3d Cir. 1968). In 1973, however, the court said that it could review *de novo* those claims in military habeas corpus cases that were "not dependent upon any evidentiary or factual construction." *Levy v. Parker*, 478 F.2d 772, 783 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974). It is high time for a clear standard to be articulated.

Id. 7a. In this case, the Third Circuit stated "that at least absent a challenge to the constitutionality of the statute under which the defendant was convicted, . . . our inquiry in a military habeas case may not go further than our inquiry in a state habeas case." *Id.* 9a. The court then reviewed this case by applying the standards for reviewing state court convictions under 28 U.S.C. § 2254(d), a section of the habeas corpus statute that Congress enacted in 1996 and which states that a prisoner in custody after a state court conviction is not eligible for habeas relief unless the state court's proceeding

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Pet. App. 9a. *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996). Applying this scope of review, the court said that there was "no basis for rejecting the determination of the Army Court of Military Review that Brosius was not in custody" during his interrogation. Pet. App. 13a. The court believed it was unnecessary to decide whether Brosius was a suspect on June 2, reasoning that any failure to give rights warnings then was harmless error. *Id.* 14a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION ON THE SCOPE OF REVIEW OF MILITARY COURTS-MARTIAL IN A HABEAS CORPUS PROCEEDING IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

To determine the proper scope of review for military courts-martial, the courts look to this Court's *Burns* decision for initial

guidance. The courts agree on only one thing, however: this is a completely confusing and standardless area of the law. As the D.C. Circuit stated in 1969, "The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969). The Third Circuit agreed, stating that the issue "has long been the subject of controversy and remains unclear." Pet. App. 5a. *See also Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (federal courts' interpretation of *Burns* is "anything but clear"); *Allen v. VanCantfort*, 436 F.2d 625, 629 (1st Cir. 1971) ("considerable confusion has surrounded the 'full and fair consideration' standard enunciated in *Burns*").

Believing that *Burns* is "far from clear in all respects," the Third Circuit nevertheless believed *Burns* "held that in considering a constitutional claim involving a pure question of law or a mixed question of law and fact, a habeas court may not exercise de novo review and may not go beyond considering whether the military courts 'dealt fully and fairly' with the claim." Pet. App. 7a (quoting *Burns*, 346 U.S. at 144). In this case, the Third Circuit concluded that its review of courts-martial could go no further than its review of "determinations made by state courts." *Id.* 9a. The court then reviewed Brosius's claims under standards that Congress set forth in 1996 in section 2254(d) of AEDPA.

Both the D.C. and Eighth Circuits likewise concluded — before section 2254(d)'s enactment — that federal courts may review claims in military cases in the same manner that they review similar cases arising from state court convictions. *See DeChamplain v. Lovelace*, 510 F.2d 419, 424 (8th Cir.), *stay granted*, 420 U.S. 940, *judgment vacated as moot*, 421 U.S. 996 (1975); *Kauffman*, 415 F.2d at 997. Both of these courts believed that their approach to reviewing military cases was consistent with *Burns*. Neither court, however, has applied the new section 2254(d) in reviewing military convictions.

In *Kauffman*, the D.C. Circuit stated "that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Kauffman*, 415 F.2d at 997. The court then reviewed the merits of the case, *id.* at 997-1000, and ultimately concluded that the military courts considered the petitioner's claims "in accordance with Supreme Court standards." *Id.* at 1000. The Eighth Circuit adopted *Kauffman*'s holding, emphasizing that "servicemen . . . enjoy the same rights of due process as civilians unless the government demonstrates a need for a different rule in the military." *DeChamplain*, 510 F.2d at 424.

At the other extreme, the First, Ninth, and Federal Circuits apply a *de novo* scope of review when considering collateral attacks on court-martial convictions, without referring to the manner in which courts review state court convictions. *Sisson v. United States*, 814 F.2d 634 (Fed. Cir. 1987); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981); *Allen v. VanCantfort*, 436 F.2d 625 (1st Cir. 1971). In *Allen*, the court reviewed "on the merits" the petitioner's claims that he received ineffective assistance of counsel, that the charges against him were not sufficiently specific, and that his *Miranda* rights were violated. *Allen*, 436 F.2d at 629-31. In *Hatheway*, after stating that *Burns* "does not preclude civil court jurisdiction of the constitutional defects alleged here," the court reviewed *de novo* the merits of claims of selective prosecution and validity of a jury instruction, as well as the constitutionality of the statute under which the petitioner was convicted.[6] *Hatheway*, 641 F.2d at 1381-84.

The Federal Circuit has jurisdiction to consider the validity of court-martial convictions when individuals seek back pay,

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[6] *Hatheway* was not a habeas corpus proceeding but instead was based on the court's mandamus jurisdiction under 28 U.S.C. § 1361. *Hatheway*, 641 F.2d at 1379. However, the court cited *Burns v. Wilson* and applied the same principles that apply in habeas corpus proceedings.

because court-martial sentences may include discharges from the military, fines, and forfeitures of pay. Although the court defers to the military courts on factual matters, the Federal Circuit reviews constitutional and legal issues *de novo*. "*Burns v. Wilson* dealt with reevaluation of evidentiary issues and mere problems of proof, but the Supreme Court has made it very clear that constitutional and fundamental questions, going to the validity of the court-martial, can properly be reviewed by the civil courts." *Sisson*, 814 F.2d at 637 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 744-45 (1975), and *United States v. Augenblick*, 393 U.S. 348, 356 (1969)).

Courts in the Fifth and Tenth Circuits use a hybrid approach, initially applying a four-factor test to determine which of a prisoner's claims they will review, but then applying a *de novo* scope of review to the claims ultimately considered. *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990); *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975). The four factors are: 1) whether the asserted error is of substantial constitutional dimension; 2) whether the issue is one of law rather than of disputed fact already determined by the military tribunals; 3) whether military considerations may warrant different treatment of constitutional claims; and 4) whether the military courts gave adequate consideration to the issues involved and applied proper legal standards. For claims that survive the four-factor test, the courts review the merits of military prisoners' claims *de novo* without referring to the manner in which they review state court convictions.

In *Calley*, for example, after concluding that review of certain claims was allowed after considering the four factors, the Fifth Circuit exhaustively considered *de novo* several claimed errors, including claims of unfair pretrial publicity, *Calley*, 519 F.2d at 203-13, denial of compulsory process, *id.* at 213-19, improper discovery disclosures, *id.* at 219-26, and improper notice of the charges and former jeopardy, *id.* at 226-27. The court declined to consider other issues that apparently were unique to the military. *Id.* at 227 n.68. Although the court

denied relief, it did so only "after a careful and painstaking review of this case that no violation of Calley's constitutional or fundamental rights has occurred" and because "Calley has been afforded every right under our American system of criminal justice to which he is entitled." *Id.* at 228.

The differences among the approaches are evident. In the Third Circuit, the courts now apply the 1996 deferential statutory standards for reviewing state court convictions and will grant relief only if the military courts made "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The D.C. and Eighth Circuits decided prior to section 2254(d)'s enactment in 1996 and its accompanying restrictions that they would review military convictions as if they were state court convictions. The First, Ninth, and Federal Circuits perform a *de novo* review as long as the petitioner alleges constitutional violations. And as long as the four *Calley* factors are considered, courts in the Fifth and Tenth Circuits review constitutional issues *de novo.* Thus, under similar circumstances, United States military personnel could receive different treatment merely because they happen to be imprisoned in different locations.

The differences have a real impact on prisoners such as Brosius. For those who have strong claims that warrant habeas relief, the probability of successfully asserting those claims is significantly less in jurisdictions employing a deferential scope of review. On mixed questions of law and fact as are presented here, with respect to whether Brosius was a "suspect" or in "custody," and where the basic facts are undisputed, there should be a *de novo* or substantive review beyond merely rubber stamping in the name of deference what the military tribunal did. The courts should examine the undisputed facts and determine whether Brosius was entitled to rights warnings and whether he was entitled to conflict-free counsel.

II. THIS CASE PRESENTS IMPORTANT AND RECURRING QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT.

The questions presented by this case affect issues of increasing national importance and provide this Court with an opportunity to clarify important questions of law that have confounded and divided the federal courts since *Burns* was decided. Millions of American citizens serve in the Armed Forces and become subject to the Uniform Code of Military Justice. *See* U.S. Dep't of Defense, *Defense Almanac*, *at* http://www.defenselink.mil/pubs/almanac/ (visited Apr. 1, 2002) (1.37 million on active duty and 1.28 million in the reserves). During times of national crises, such as during the current war on terrorism, many reservists are called to active duty. Chief Justice Warren's words are just as relevant today as they were forty years ago: "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962). While the question whether military prisoners may seek habeas corpus review has long been settled, the standards for reviewing their convictions are not uniform.

Thousands of courts-martial take place annually. During fiscal year 2000, courts-martial resulted in 6,994 convictions. *See* U.S. Court of Appeals for the Armed Forces, *Annual Reports on Military Justice for the Period October 1, 1999 to September 30, 2000*, *at* http://www.armfor.uscourts.gov/annual/FY00/FY00Rept.htm (visited Apr. 1, 2002) (reports of the Army, Air Force, Navy, and Coast Guard at sections 3, 4, 5, and 6). General courts-martial may impose death sentences or confinement for up to life. UCMJ art. 18, 10 U.S.C. § 818. There are at least three capital cases pending in the military appellate system. *See* U.S. Dep't of Navy, *Annual Report of the Judge Advocate General of the Navy* 6, *at* http://www.

armfor.uscourts.gov/annual/FY00/FY00NavyReport.pdf (visited Apr. 1, 2002).

The question concerning the proper scope of review will continue to arise frequently,[7] because military prisoners must seek habeas corpus review in the jurisdiction where they are confined. *See Daigle v. Warner*, 490 F.2d 358, 360 (9th Cir. 1973) (review of a Marine Corps case in Hawaii). Overseas prisoners may seek review in the federal courts for the District of Columbia. *Ex Parte Hayes*, 414 U.S. 1327, 1328-29 (1973). Even those who are not given prison terms or who have already served their confinement may seek review in the district courts or in the Court of Claims, because courts-martial sentences may include other punishments that affect military pay. *See United States v. Augenblick*, 393 U.S. 348, 349 (1969) (reviewing a Court of Claims decision); *Kauffman*, 415 F.2d at 994 (Air Force officer had already served his period of imprisonment). Once they seek that review, however, the forum court will apply whatever variant of the *Burns v. Wilson* "full and fair" consideration standard it finds persuasive at the time.

Federal courts — either as a result of precedent or statutes — do have uniform standards for reviewing civilian prisoners' cases. Prior to AEDPA's enactment in 1996, courts reviewed state prisoners' constitutional and legal claims *de novo*. As Yale Professor Joseph W. Bishop wrote in 1974, "If a federal court is satisfied that a state prisoner was, in fact, denied the effective assistance of counsel, or that a coerced confession was in fact admitted in evidence against him, it will grant the writ regardless of what the state courts may have thought about those issues." Joseph W. Bishop, Jr., *Justice*

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[7] Recent district court cases include: *Ingram v. Tillery*, 42 F. Supp. 2d 1188 (D. Kan.), *aff'd*, 201 F.3d 448 (1999); *Jordan v. Warden*, No. Civ. 1:CV-97-0465, 1998 WL 614694 (M.D. Pa. Aug, 31, 1998); *Romey v. J. Vanyur*, 9 F. Supp. 2d 565 (E.D.N.C. 1998); and *United States v. Wallace*, No. CIV. A. 96-3893, 1997 WL 476340 (E.D. La. Aug. 19, 1997).

Under Fire 133 (1974). Before AEDPA, "federal courts could adjudicate the complaint on the basis of legal principles that had *never* become binding on state courts, *i.e.*, on the basis of federal circuit law developed in the absence of any controlling Supreme Court law on point." 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 30.2a, at 1233-34 (3d ed. 1998) (emphasis in original). After AEDPA's enactment, standards for reviewing state court convictions became narrower, but nevertheless remained uniform. Likewise, uniform standards govern review of federal court convictions under 28 U.S.C. § 2255.

Military prisoners are the only class of United States citizens whose convictions are subject to varying standards of review in the federal courts. By its own terms, section 2254 applies only to review of state court convictions. Further, courts-martial are not the type of federal courts falling under the provisions of section 2255.

When Congress enacted AEDPA in 1996, it left undisturbed whatever principles this Court and other courts had established for reviewing military convictions. If courts use *Burns v. Wilson* as authority that they should use standards for reviewing state court cases, it certainly is not clear that they should apply the new AEDPA section 2254(d) standards. The Third Circuit's decision appears to be the only case applying AEDPA's standards to military convictions. The new section 2254(d) plainly "requires federal courts to accord more respect than previously was due to a state court determination of law." 2 Liebman & Hertz, *supra*, § 30.2b, at 1236.

Thus, if this Court in 1953 intended federal courts to perform a comparable or somewhat narrower review of military convictions than of state convictions under then-existing principles, the standard for reviewing military convictions now may actually be *broader* than the standards for reviewing state convictions under the new section 2254(d). Some authorities believe that federal court review of courts-martial convictions historically *was* broader than review of state court convictions

before AEDPA's enactment. Justice Frankfurter argued that the *Burns* plurality's statement that review of military convictions was narrower was "demonstrably incorrect." *Burns v. Wilson*, 346 U.S. 844, 844 (1953) (opinion of Frankfurter, J., in order denying rehearing). *See also Calley*, 519 F.2d at 198 n.20; Bishop, *supra*, at 136. The Third Circuit erred in this case by applying the more restrictive current standards of AEDPA.

American citizens who wear military uniforms deserve uniform procedures when they are subjected to military criminal justice, both under the UCMJ when their courts-martial are conducted and in the civilian courts if they seek habeas corpus review. The degree to which the courts examine military convictions should not vary depending only on the happenstance of where these American citizens are confined within the federal penal system. This Court should therefore grant this petition for a writ of certiorari and establish a uniform standard of habeas corpus review.

III. A *DE NOVO* SCOPE OF REVIEW SHOULD BE APPLIED TO THE MILITARY COURTS' LEGAL AND CONSTITUTIONAL RULINGS.

Where a habeas petitioner challenges only the military courts' legal and constitutional rulings and does not dispute reasonable factual findings, this Court should hold that the military courts' rulings are subject to *de novo* review. Here, the facts establish that Todd Brosius requested counsel but was given the prosecutor who happened to be Brosius's counsel for another matter. With a *de novo* scope of review, the Court should determine that Brosius was a "suspect" in "custody" and that the CID agents violated Brosius's rights under the UCMJ and the Fifth Amendment.

A. The Court should hold that a *de novo* review is required.

Federal civilian courts undoubtedly are qualified to ensure that military members' legal and constitutional rights are

respected properly and are not grossly violated. The type of collateral review that Brosius seeks here is consistent with this Court's long-standing *Burns* case, will not interfere with administration of military justice, and requires only that the courts apply well-understood principles of law.

First, *Burns* does not prohibit *de novo* review of legal and constitutional claims. The petitioners in *Burns* openly requested a re-evaluation of the record to contest disputed factual matters that had previously been resolved against them. *Burns*, 346 U.S. at 139, 144. The Court held that "when a military decision has dealt fully and fairly with an allegation raised in the [habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142. Brosius is not asking for such a re-evaluation of evidence here, because the facts are undisputed. He asks only that the Court resolve legal and constitutional issues based on the undisputed facts. Where the military courts do not resolve factual issues "fully and fairly," of course, such as when they speculate on the existence of evidence to support key findings, *Burns* does allow a factual review.

Second, reviewing Brosius's claims *de novo* will not interfere with the military justice system. A *de novo* review in a military habeas corpus case has no more potential to interfere with the military than a direct review on a petition for certiorari, such as in *Davis v. United States*, 512 U.S. 452 (1994). *See also Jordan v. United States*, 498 U.S. 1009 (1990) (granting petition for certiorari and remanding case to the Court of Military Appeals). In addition, *de novo* review of courts-martial does not result in any intrusion into the exercise of power by another sovereign, *see Engle v. Isaac*, 456 U.S. 107, 128 (1982), because federal courts are an instrumentality of the same sovereign that administers courts-martial.

Third, civilian courts are at least as well-equipped as military courts are to review the types of legal and constitutional issues presented here. Although federal courts are willing to defer to the military on issues that are unique to

the military, *see Calley*, 519 F.2d at 227 n.68, this case presents common issues that are well within the ability of civilian courts to consider.

B. Although Todd Brosius requested counsel, the agents provided the prosecutor to him, who happened to be Brosius's counsel for a civil matter.

Civilian courts can easily resolve *de novo* whether Brosius was entitled to see a lawyer other than the prosecutor. There is no dispute that Brosius requested counsel. The agents understood his request at the First Sergeant's office, because they sent him to the River Building and *told him he would be able to see a lawyer there*. Pet. App. 21a. The only reason they sent him there was "because that's where the attorneys were." R.146. Without question, the agents led Brosius to believe that he would get counsel. The agents' and prosecutors' conduct following the multiple requests, however, is nothing less than mind-boggling.

While he was being transported to the River Building, the agents and the prosecutors devised a scheme of deception. There is no other way to explain what transpired. After the prosecutors[8] huddled with each other and apparently decided to take advantage of the initial counsel request that they perceived as ambiguous, they decided that Brosius would not be given his own individual counsel. Instead, they would allow him to meet with the prosecutor supervising the investigation, Captain Ewing. Pet. App. 23a-24a. Ewing did not know, of course, that the soldier about to appear was his own client concerning an unrelated civil matter. When Brosius arrived at the River Building, he was told that an attorney was present, because "you requested one." *Id.* 29a. Ewing was introduced as being "from JAG," R.177, without a disclosure that Ewing had been assigned to the case as the prosecutor. Pet. App. 42a n.7.

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[8] The district court mistakenly referred to one of these officers as the "senior trial *defense* counsel." Pet. App. 23a-24a.

Ewing, continuing the deception (willful or accidental), had no intention of ensuring that Brosius's rights were respected or of being Brosius's personal defense counsel.

Ewing surely must have been surprised when he found out that Brosius already was Ewing's own client for another matter. Ewing saw the need to give *some* explanation to Brosius. He went to a separate room with Brosius and said only that he was "working with the cops." Pet. App. 4a.

Ewing's brief private talk with Brosius was insufficient to resolve the ethical issue presented. Ewing clearly had conflicts of interest. First, he was a prosecutor blithely passing himself off as one who could look after Brosius's interests; and second, he learned that Brosius was already a client on a civil matter. He was involved in a charade where he was representing the questioners and the suspect. He became obligated to either continue his representation of one party after full disclosure to and consent from both, or to withdraw. Either way, he had a law enforcement obligation and, as a lawyer, an ethical obligation to ensure that Brosius's interests were protected and to ensure that proper substitute counsel was provided for Brosius before his interrogation continued. The Third Circuit was troubled by Ewing's actions, but described Ewing's actions only as "inadvisable." *Id.* 16a.

Ewing appears to have been completely unaware of his obligation or so caught up in the deception that he failed to take proper action under *Miranda* when he personally heard Brosius make a second and unambiguous request for counsel. *Id.* 23a. There can be no question that, regardless of what had transpired so far, the interrogation should have been halted at that time until Brosius was provided with his own counsel.

Continued questioning under these circumstances was a horrible breach of the rules of professional conduct. A soldier is entitled to "a lawyer who is peculiarly and entirely the accused's own representative." *United States v. Tempia*, 37 C.M.R. 249, 259 (C.M.A. 1967). Military lawyers, just like

civilians, are ethically prohibited from representing clients with opposing interests unless both clients consent after proper disclosures. Dep't of Army Reg. 27-26, *Legal Services: Rules of Professional Conduct for Lawyers*, Rule 1.7 (May 1, 1992).[9] When terminating or withdrawing, lawyers must "take steps to the extent reasonably practicable to protect a client's interests." *Id.* Rule 1.16(d).

C. Brosius was a "suspect" entitled to rights warnings.

Brosius made his request for counsel at a time when the CID agents should have considered him to be a "suspect," which entitled him to a warning of the right to remain silent, *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999); UCMJ art. 31(b), 10 U.S.C. § 831(b), regardless of whether he was in custody. Courts use a two-part objective/subjective standard to determine whether a soldier is a "suspect." *Muirhead*, 51 M.J. at 96. The test is "whether a reasonable person would consider someone to be a suspect under the totality of the circumstances," or subjectively, "if the investigator considered the interrogated person to be a suspect." *Id.* The courts, however, do not apply this test in reverse and *exclude* soldiers from the "suspect" category if either the objective or the subjective standard is *not* satisfied. The courts must determine that soldiers are not "suspects" under *both* standards. This is clear from the *Muirhead* case, upon which the district court relied. Pet. App. 34a.

Here, the district court used the subjective prong to *exclude* Brosius as a "suspect" without analyzing the evidence objectively. *Id.* 36a. Thus, the court concluded only under the subjective prong that the military courts "fully and fairly" found Brosius was not a "suspect" and that the agents therefore were justified in not giving him rights warnings. This was an error. The district court's analysis conflicts with the *Muirhead* standard. The district court performed no review whatsoever

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[9] This rule was also in effect at the time of Brosius's interrogation.

of whether the military courts "fully and fairly" decided the issue under the *objective* standard.

The Third Circuit declined to consider the issue whether Brosius was a "suspect" entitled to rights warnings. It held that any failure to suppress the June 2 statements was harmless error. Pet. App. 14a. As discussed below, however, this error certainly was not harmless.

The undisputed facts establish that Brosius was a suspect on the evening of June 2 under the objective standard that the district court failed to apply. *See* Statement, *supra*, at 4-5; Pet. App. 24a-25a. In light of these facts, the agents must be deemed to know that Brosius was a suspect and that a rights warning was required. Moreover, the prosecutor at the scene, Captain Ewing, candidly admitted that, had the agents informed him of all of these facts, he would have been led to believe that Brosius was a suspect, Pet. App. 25a, even though the agents claimed they had a good faith belief that Brosius was not a suspect at that time. Additionally, the agents seized Brosius's clothing and sent it away for laboratory analysis, because they learned that it was the same clothing he was wearing when he entered the base with the decedent. *Id.* 24a. It is quite a stretch to say that Brosius was a mere third-party witness, not a suspect, once his clothes were taken.

The agents admitted that, on the following morning, they formed the *subjective* belief that Brosius was a suspect. They also admitted, however, that they formed this belief based on the *same objective facts of which they were aware the previous evening*. *Id.* 24a. They could point to nothing new that appeared by morning.

When faced with Brosius's motion to exclude statements, it was the *government's burden* to prove that Brosius was not a suspect on the evening of June 2. The military trial judge recognized the deficiency in the government's proof, and that Brosius's statements had to be suppressed unless additional evidence was forthcoming. Thus, the judge asked CID Agent

Nash if there was anything else in addition to the previously known facts "that made people take a second look" at Brosius the following morning. R.171. Nash was unable to provide any additional information, and other available witnesses Nash said *might* be able to answer the question were not called. Pet. App. 24a. No one explained whether CID learned *anything* new, and there was *no explanation* of why the agents and Ewing could not have objectively determined on Saturday evening that Brosius was a suspect. The conclusion is inescapable. The evidence that the government had on Sunday morning was the same as it had on Saturday evening.

In his findings and conclusions, the judge said: "On the next day in the CID meeting, the fact that the accused said there were three in the car, and a gate guard said he only saw two, *along with other evidence*, caused the CID to believe that the accused should be considered a suspect." Pet. App. 27a (emphasis added). The judge could not elaborate on what this "other evidence" was, because it was never produced. It remains unknown to this day. *Id.* This is the hole in the record that was never filled and which tips the scale in Brosius's favor on this critical issue.

Thus, on this outcome-determinative issue, the judge made a key ruling based on nothing more than speculation or conjecture. He *assumed* that some unknown evidence supported his decision, and he knew that additional evidence was necessary to deny the suppression motion. That is why he asked such a pointed question at the hearing, and that is why he referred to the mysterious "other evidence." He disregarded his important duty to "state essential findings of fact on the record." *Manual for Courts-Martial, United States, 1984, Military Rules of Evidence*, Rule 304(d)(4). Brosius was never informed of the evidence upon which the trial judge relied to decide that Brosius was not entitled to a rights warning until the morning of June 3.

In *Burns*, this Court stated that federal courts should not re-evaluate evidence considered by military courts, but only so

long as the military courts considered claims "fully and fairly." *Burns*, 346 U.S. at 142. Here, the military court did not "fully" consider this claim, because the trial judge and the prosecutor failed to call available witnesses that another agent said *might* have the answer to the judge's question. A fair inference is that these agents were not called because they had *nothing* additional to offer. Likewise, the judge did not "fairly" make his decision, because he *assumed* the existence of outcome-determinative evidence. The judge's ruling on this issue was neither "full" nor "fair." Because the military court failed to consider this claim "fully and fairly," even *Burns* allows federal courts to re-evaluate the evidence. *Id.*[10]

When ACMR considered this issue, it did not openly rely on the unknown evidence as the trial judge did. ACMR ruled that the agents determined on June 3 that Brosius was a suspect based only on the gate guard discrepancy. Pet. App. 51a. However, ACMR perpetuated the error, because it failed to take the next logical step of finding that CID had that same information the previous evening to conclude under the *objective* standard that Brosius was a suspect. As with the trial judge's decision, the direct military appellate review of this issue was neither "full" nor "fair."

Brosius should have received the UCMJ article 31 rights warning before being questioned, and the failure to give that warning warrants habeas relief. Even beyond that issue, as a separate basis for relief, is the failure to give the required *Miranda* warning during what was a custodial interrogation.

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[10] In fact, the district court here *did* re-evaluate evidence, although it did so erroneously. In concluding that one circumstance changed by June 3 to cause the agents to *subjectively* believe Brosius was a suspect, the court noted that another suspect's "alibis were proving to be true." Pet. App. 36a. The court correctly said, however, that the military did not rely on this. *Id.* The reason was that the agents knew *the previous afternoon* that the other suspect had an alibi, and that is the reason they were interviewing witnesses before they interviewed Brosius. R.146.

D. Brosius was in "custody" when he requested counsel.

Individuals undergoing custodial interrogation are entitled to constitutional rights warnings. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). There is no disagreement here that a person undergoing custodial interrogation who requests counsel is entitled to a lawyer regardless of whether the agents provide *Miranda* warnings. To determine whether a person is in custody, courts once again use an objective standard. *See* Statement, *supra*, at 3-4.

The district court and the Third Circuit both recognized that Brosius was ordered to attend the CID interview, because Brosius's First Sergeant "called" him to the First Sergeant's office and "sent" him there. Pet. App. 38a, 40a, 11a. Applying an overly deferential scope of review, however, both the district court and the Third Circuit decided that they would not disturb the military courts' conclusion that Brosius was not in custody. *Id.* 41a, 11a.

Under a *de novo* scope of review, Brosius's claim has strong merit. As the district court said, the real issue is "whether [Brosius] had been deprived of his freedom of action in any significant way." *Id.* 40a. Federal law, military caselaw, and the realities of military life establish that Brosius was in custody.

Soldiers must obey lawful orders, and if Brosius did not obey *this* order to attend the interview, he could have been punished for disobeying the First Sergeant. UCMJ art. 91(2), 10 U.S.C. § 891(2). The Court of Military Appeals has recognized for decades that an order to appear for an interrogation creates "custody" for *Miranda* purposes. In *Tempia*, just as in this case, a soldier was "called" for an interrogation. The court recognized a distinct difference between civilian and military interrogations.

> In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to

> warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action. . . . Hence, we conclude that there was "custodial interrogation" in this case.

Tempia, 37 C.M.R. at 256 (citation omitted). Military courts continued to understand this reality throughout the years. As ACMR said in 1989, when "an individual['s] superior order[s] him to report to the CID office . . . this face-to-face interview is a *custodial* interview." *United States v. Granda*, 29 M.J. 771, 776 (A.C.M.R. 1989) (emphasis added).

When Brosius was ordered to the interview, there is no question that he was significantly deprived of his freedom of action. He could not ignore the order and exercise "freedom of action." An order is "disobeyed at the subordinate's peril." *United States v. Padgett*, 48 M.J. 273, 276 (C.A.A.F. 1998).

Likewise, on this Saturday evening when Brosius later was directed to report to CID headquarters (the "River Building") to speak to agents there — and to speak to the lawyer the agents said they would provide — his inability to exercise "freedom of action" continued. At the agents' request, the First Sergeant had another Sergeant "escort" Brosius, Pet. App. 12a, thus ensuring that Brosius did not stray from his ordered path or go about any other business.

The agents' request that an "escort" take Brosius to the River Building was the military equivalent of requesting that he be taken there under guard to ensure that he arrived there for his interrogation. Military personnel and judges understand that, in the military, the word "escort" is synonymous with the word "guard." *See United States v. Worstell*, No. ACM 31915, 1996 WL 595229, at *2 (A.F. Ct. Crim. App. Oct. 9, 1996) (personnel assigned to "escort/guard" the appellant); *United States v. Borges*, 41 M.J. 739, 743-45 (N-M Ct. Crim. App. 1994) (reviewing cases where military personnel escaped from "escorts"; "custody" is when the soldier "reasonably knows

that he remains subject to the custodian's influence or control"); *United States v. Johnson*, No. ACM 30890, 1994 WL 175767, at *2 (A.F.C.M.R. Apr. 25, 1994) (appellant "broke away from his escort"). "Custody continues as long as the accused is in the presence of the escort . . . ." *United States v. Clements*, 40 M.J. 713, 714 (N.M.C.M.R. 1994).

These undisputed facts establish that Brosius was in "custody." This case is quite different from a civilian context where someone may "voluntarily" accompany a police officer to the station. Civilians cannot be prosecuted for declining to go. "A key concern for civilian criminal investigators is the procedure by which they arrange for a suspect to be available for interrogation. . . . The military criminal investigators rel[y] on the commander's purported authority to order his soldiers to cooperate in the investigation." *United States v. Schake*, 30 M.J. 314, 317 n.4 (C.M.A. 1990).

Continued questioning was a blatant substantive violation of the Fifth Amendment, not merely a "technical violation" of *Miranda*'s rights-warning requirement, establishing that Brosius's statements were impermissibly compelled from him. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *United States v. Goodson*, 22 M.J. 947, 948-50 (A.C.M.R. 1986) (statement excluded after soldier requested counsel and was then questioned by his commander two days later). Obtaining a statement without *Miranda* warnings "creates a presumption of compulsion," and such statements "must . . . be excluded." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

After a statement is obtained in violation *only* of *Miranda*'s technical rights-warning requirement (*i.e.*, if an actual request for counsel is not ignored), subsequent statements can be admitted if there was a proper rights warning and waiver. *See Elstad*, 470 U.S. at 314. This rule applies, however, only if there were no "deliberately coercive or improper tactics in obtaining the initial statement." *Id.* The agents' and prosecutors' tactics in Brosius's case *were* "deliberately coercive or improper." This Court warned that the *Elstad*

"subsequent waiver" rule would not apply in cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were *flatly ignored* while police subjected them to continued interrogation." *Id.* at 312 n.3 (emphasis added). That is precisely what occurred here. The CID agents did not merely fail to give *Miranda* warnings and then come within the *Elstad* rule by giving warnings later. Ewing and the CID agents engaged in improper tactics to obtain the first statement; they actually denied Brosius's right to counsel and "flatly ignored" his request. The subsequent statements were a follow-on product.

CID's continued questioning of Brosius with Ewing participating was therefore a substantive Fifth Amendment violation, not merely a technical failure to administer *Miranda* warnings, which warrants a presumption that *all* subsequent statements were coerced and improperly compelled from Brosius even though rights warnings were given later. *Elstad*, 470 U.S. at 312 n.3, 314, 318; *see Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir. 1995); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992). This rule applies with more force in the military with its "subtle pressures" than in civilian society. *United States v. Kruempelman*, 21 M.J. 725, 727 (A.C.M.R. 1985).

E. The errors were not harmless.

After finding an error, courts may grant habeas corpus relief if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 776 (1993). The Third Circuit declined to enforce the *Elstad* standard, and instead held that any errors on June 2 were harmless because of later rights warnings. Pet. App. 16a-17a. There is no question, however, that the military courts' mistakes were not harmless error.

It is impossible to overstate the impact of the errors. The Third Circuit reviewed the contents of Brosius's first statement and decided it was of no consequence because it added nothing

new to what he had said to others and because he was given rights warnings later. As the district court said, however, the first statement "led" to the others. *Id.* 19a. It was also used against Brosius at his trial. *Id.*; R.535. If CID would have provided warnings the first time, there is no doubt that Brosius would have invoked his rights and that the questioning would have stopped, *because Brosius in fact did request counsel.* His request should have been honored without efforts to deceive him. If CID had provided conflict-free counsel, that counsel would have been notified before subsequent questioning, and no one can say Brosius would have made subsequent incriminating statements.

This whole questionable procedure resulted in a "confession" that Brosius immediately recanted. There is no other compelling evidence of guilt, and the government's case collapses without Brosius's statements. The "confession," if true, leaves no doubt that forensic evidence should have connected Brosius with the crime, but none of it did. Some evidence was totally inconsistent with this "confession."[11] Further, the "confession" describes a multiple stabbing during a sex act, which should have left huge amounts of blood on Brosius and his clothing; yet, a soldier saw Brosius in the barracks a short time later and said that Brosius had no blood on him. *See* Pet. App. 56a (summarizing the evidence). There was no motive for the murder.

Brosius never would have been convicted but for the existence of this "confession" that the agents and Ewing obtained unconstitutionally and unethically. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . .'" *Arizona v.*

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[11] A CID agent testified that the "confession" was "erroneous as to certain particulars." Pet. App. 53a. For example, the cuts that the "confession" detailed and the murder weapon that the "confession" described were wrong. *Id.*

Fulminante, 499 U.S. 279, 296 (1991) (citation omitted). The Court should therefore conclude that the errors were not harmless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 23, 2002

278 F.3d 239

**UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT.**

Michael Todd BROSIUS, Appellant,

v.

**WARDEN, UNITED STATES PENITENTIARY,
LEWISBURG, PA.**

No. 01-1102.

Argued Sept. 7, 2001.
Opinion Filed Jan. 23, 2002.

Before: BECKER, Chief Judge, ALITO, and BARRY, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge.

This is an appeal by Michael Todd Brosius from an order dismissing his petition for a writ of habeas corpus. Brosius was convicted of unpremeditated murder following a general court martial, and he is serving a sentence of imprisonment. His conviction was affirmed by the Army Court of Military Review, *see United States v. Brosius,* 37 M.J. 652 (A.C.M.R. 1993), and the Court of Military Appeals granted review but summarily affirmed without opinion. *See United States v. Brosius,* 39 M.J. 378 (C.M.A. 1994). Brosius, who is imprisoned at the United States Penitentiary in Lewisburg, Pennsylvania, then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Middle District of Pennsylvania. The District Court denied

his petition, *Brosius v. Warden*, 125 F. Supp. 2d 681 (M.D.Pa. 2000), and this appeal followed.

I.

At approximately 4:40 a.m. on June 2, 1990, two sergeants in the United States Army found Private First Class Tammy Ivon near death in the parking lot adjacent to the enlisted service members' barracks at the United States Army Airfield in Giebelstadt, Germany. When Ivon was found, her legs were protruding from under a pickup truck, and her jeans had been pulled down to her ankles. One of the sergeants noticed a man whom he identified as Brosius staring at him from a nearby road. After several seconds, Brosius, who had been a close friend of Ivon's, walked away. A short time later, Ivon died.

An autopsy revealed that Ivon had been stabbed 11 times, four times in the chest, five times in the abdomen, and once near each eye. Ivon's car was found parked next to the pickup, and the back seat of the car was stained with blood. The sign-in log for a gate on the base showed that Ivon's car had returned at 2:30 a.m. with two occupants. A witness who had passed Ivon's car at about 3:00 a.m. stated that the windows were fogged, he heard a grunt or groan coming from inside, and he thought that the occupants were having sex.

Numerous witnesses described Brosius's behavior during the hours after Ivon's body was found. A witness who saw him at 7:25 a.m. described him as shocked and dazed. At 7:30 a.m., he told another witness that he had just come from working out in the gym although the gym was closed at the time. He told another witness that a girl who had given him a ride home two hours earlier was dead and that he suspected her boyfriend. Brosius then reportedly threatened to kill the boyfriend. A short time later, when another witness asked Brosius if he had heard about Ivon's death, Brosius said that he had not. Brosius then went to the laundromat and told a witness who later testified for the prosecution that Ivon had given him a ride home that night and that he might have been the last person to see her

alive. He said that he had heard that she had been stabbed 11 times. He told another witness who testified for the defense that a third person had accompanied Ivon and him when they drove back to the base. At 11:10 a.m., he awakened his roommate, screaming that Ivon's boyfriend had killed her.

Word reached Brosius's first sergeant that Brosius had been with the victim on the night of her murder, and the first sergeant then provided this information to agents from the Criminal Investigation Division ("CID"). Brosius was called to the orderly room, and Special Agents Douglas Allen and Tyrone Robinson took Brosius into the first sergeant's office and spoke with him. Brosius stated that on the night of the murder, Ivon had driven another soldier and him back to the base from a local club. When Special Agent Allen asked the identity of the third person, Brosius replied that he did not wish to say anything about it. According to Special Agent Allen, Brosius then requested to have a lawyer, his first sergeant, or some other third party present to witness his statement. According to Brosius, he asked to have a lawyer present, but Brosius admitted that it was "possible" that he might have also mentioned his first sergeant. Special Agent Allen told Brosius that there were lawyers at the CID Headquarters ("the River Building") in Wuerzburg and that if he wanted to speak to a lawyer or someone else, he should go there. Sergeant Pickett, Brosius's section sergeant, drove him to the River Building. Sergeant Pickett and Brosius were acquaintances. App. 75.

At the River Building, Special Agent Mark Nash questioned Brosius without administering any warning of rights. Special Agent Nash told Brosius that the victim's boyfriend was the main suspect and that if Brosius "was worried about rights or anything being violated, if you start to say anything that we think would be incriminating against you, we would stop you and advise you of your rights." App. 19-20. Special Agent Nash told Brosius that Captain Harper Ewing would be available to witness the interview. Captain Ewing was the prosecutor assigned to the case.

When Captain Ewing arrived, Brosius recognized him as an attorney who had represented him in an earlier civil matter. Captain Ewing asked Brosius some questions about the prior representation in order to ascertain whether there was a conflict that would prevent him from prosecuting the case. Special Agent Nash and Captain Ewing both told Brosius that Captain Ewing was a prosecutor and was "working with the cops," but Brosius did not voice any objection. Captain Ewing acknowledged, however, that Brosius said something to the effect that he wanted an attorney present because he did not trust the police and feared that they would twist his words. App. 43-44. Captain Ewing testified that he thought that Brosius was simply requesting someone to record his words accurately and was not requesting legal representation, and Special Agent Nash testified that Captain Ewing was present at the interview for that purpose. Brosius did not ask Captain Ewing any questions or request legal advice, but he testified at trial that he thought that Captain Ewing was his lawyer because Captain Ewing had represented him in an earlier matter and was present while he was being questioned.

At the end of the interview, Brosius signed a written statement. The chief points stated were that: 1) Ivon had given Brosius a ride back to the base from the club; 2) another male soldier, whom he described, had accompanied them; 3) Ivon had a troubled relationship with her boyfriend; and 4) Brosius had last seen her at about 2:55 a.m. Brosius's statement seems to have added little if anything of substance to what he had told other witnesses during the hours immediately after Ivon's body was discovered. The CID agents also took the clothing that Brosius had worn on the night of the murder, but it apparently did not yield any incriminating evidence. After the interview, Brosius returned to his unit.

Brosius returned for further questioning on June 4 and 5. At this time, he was warned of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), and Article 31 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 83. After

receiving these warnings, Brosius waived his rights and eventually confessed to the murder. He said that he had returned to the base with Ivon and that no one else was in the car. When they reached the parking lot, he stated, they started to have intercourse, but he realized that this "wasn't right" because she was "like a sister" to him. He stated that he stabbed her in the chest and stomach and then, because she was looking at him, in the eyes. He said that he stabbed her about nine times. At the end of the confession, however, he stated: "I don't believe I did it and if I did I want help. I feel like I falsified the whole statement."

II.

The degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear. Nearly 50 years after it was decided, the Supreme Court's decision in *Burns v. Wilson,* 346 U.S. 137 (1953), is still the leading authority. In *Burns*, two soldiers were tried by court martial, found guilty of murder and rape, and sentenced to death. They filed habeas petitions claiming that they had been denied due process of law. Some of the claims appear to have presented pure questions of fact (*e.g.*, whether the petitioners were beaten and denied food and sleep before they confessed), while other claims presented either mixed questions or questions of law (*e.g.*, whether, on the undisputed facts, their confessions were coerced). The district court dismissed the petition, and the court of appeals affirmed. *Burns v. Lovett,* 202 F.2d 335 (D.C.Cir. 1952). The court of appeals applied the following standard:

> [H]abeas corpus will not lie to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violation of constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstance, the petitioner has not been able to obtain adequate protection of that right in the military process.

Id. at 342. Applying this standard, the court reviewed each of the petitioner's allegations and found that none warranted relief.

The Supreme Court affirmed by a vote of 6 to 2 but without a majority opinion. One member of the majority, Justice Minton, took the position that the Court could do no more than inquire whether the court martial had jurisdiction. *Burns,* 346 U.S. at 146-48 (Minton, J., concurring in judgment). However, the plurality opinion written by Chief Justice Vinson and joined by three other Justices concluded that the Court's inquiry was somewhat broader. The plurality stated that the petitioners' allegations "were sufficient to depict fundamental unfairness" and that the district court could have reviewed these claims de novo if the military courts had "manifestly refused to consider" them. *Id.* at 142. But because the military courts had "heard petitioners out on every significant allegation" and had "given fair consideration to each of the[ir] claims," the plurality stated, the petitioners had "failed to show that this military review was legally inadequate." *Id.* at 144-46. The plurality added that "although the Court of Appeals may have erred in reweighing each item of relevant evidence in the trial record, it certainly did not err in holding that there was no need for a further hearing in the District Court." *Id.* at 146. Justice Jackson, the sixth member of the majority, concurred in the result without opinion. *Id.*

Justice Douglas, joined by Justice Black, dissented, arguing that it was proper to determine in the habeas proceeding whether, based on the undisputed facts, *viz.*, that the petitioners had been held incommunicado and repeatedly questioned over a period of five days, the petitioners' confessions had been unconstitutionally obtained.[1] *Burns,* 346 U.S. at 154-55 (Douglas, J., dissenting).

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[1] The ninth Justice, Justice Frankfurter, did not vote to affirm or reverse but stated the Court should have put the case down for reargument. 346 U.S. at 150.

Although the rule that emerges from *Burns* is far from clear in all respects, it appears that a majority (the plurality plus Justice Minton) held that in considering a constitutional claim involving a pure question of law or a mixed question of law and fact, a habeas court may not exercise de novo review and may not go beyond considering whether the military courts "dealt fully and fairly" with the claim. Moreover, the plurality's treatment of the petitioners' coerced confession claim suggests that full and fair consideration was intended to mean no more than "hear[ing]" the petitioners "out." *Burns*, 346 U.S. at 144. Although it appears that the Judge Advocate General, then the highest reviewing officer, had not addressed the question whether the undisputed facts relating to the confessions established a violation of the governing Supreme Court precedent concerning unconstitutionally coerced confessions,[2] the plurality rejected the coerced confession claim with the simple statement that "there was exhaustive inquiry into the background of the confessions-with the taking of testimony from the persons most concerned with the making of these statements." *Id.* at 145.

Lower courts have had difficulty applying the *Burns* "full and fair" test. The Tenth Circuit, which has the most experience with habeas petitions filed by service members due to the location of the Disciplinary Barracks at Ft. Leavenworth, Kansas, has stated that "[t]he federal courts' interpretation—particularly this court's interpretation—of the language in *Burns* has been anything but clear." *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990); *see also, e.g., Kauffman v. Sec. of the Air Force*, 415 F.2d 991, 997 (D.C.Cir. 1969) (the test "has meant many things to many courts").

Our court's treatment of Burns has also been far from seamless. In *United States ex rel. Thompson v. Parker*, 399

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[2] *See Burns*, 346 U.S. at 154-55 (Douglas, J., dissenting).

F.2d 774 (3d Cir. 1968), we interpreted *Burns* narrowly. The petitioner argued that his confession had been obtained in violation of the Fifth Amendment and Article 31 of the UCMJ, but we rejected that argument with the terse statement that "the district court, after determining that the military courts had given due consideration to petitioner's contentions, quite correctly refused to review and reevaluate the facts surrounding petitioner's allegations." *Id.* at 776.

By contrast, in *Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974), we seemingly read *Burns* more expansively. Levy, a military doctor, was convicted by a general court martial of wilful disobedience of the lawful command of a superior officer, uttering public statements designed to promote disloyalty and disaffection among the troops, and wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful, and disloyal statements to other officers. *See id.* at 778. He contended that the articles under which he was convicted were too vague to satisfy due process. We suggested that a habeas court may examine de novo those constitutional claims "not dependent upon any evidentiary or factual construction." *Id.* at 783. The actual holding of the case, however, was limited to claims related to "the facial unconstitutionality of [a] statute" under which a petitioner was charged. *Id.* Any broader reading of *Levy* as requiring de novo review over all questions of law would be inconsistent with *Burns*, in which a majority of the Court (the plurality plus Justice Minton) applied a deferential standard of review to the claims that, on the undisputed facts, the habeas petitioners' constitutional rights were violated. *See Burns*, 346 U.S. at 154 (Douglas, J., dissenting) (arguing that "the undisputed facts in [the] case ma[de] a prima facie case that [the Supreme Court's] rule on coerced confessions expressed in *Watts v. Indiana*, 338 U.S. 49 (1949), was violated").

In the present case, we find it unnecessary to attempt any further explication of *Burns*. Whatever *Burns* means, we have

no doubt that at least absent a challenge to the constitutionality of the statute under which the defendant was convicted, such as that raised in *Levy*, our inquiry in a military habeas case may not go further than our inquiry in a state habeas case. *See Burns*, 346 U.S. at 142 ("In military habeas corpus cases, *even more than in state habeas corpus cases*, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings . . .") (emphasis added). Thus, we will assume—*but solely for the sake of argument*—that we may review determinations made by the military courts in this case as if they were determinations made by state courts. Accordingly, we will assume that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts. Under this provision, "a determination of a factual issue made by a State court" is "presumed to be correct," and a habeas petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." In considering other determinations made by the military courts, we will assume that 28 U.S.C. § 2254(d) applies. Under this provision,

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

See also Williams v. Taylor, 529 U.S. 362 (2000); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 891 (3d Cir. 1999) (en banc).

III.

Brosius argues that his conviction must be reversed because, prior to his two interviews on June 2, he was not given the warnings prescribed by *Miranda* or Article 31(b) of the Uniform Code of Military Justice, 10 U.S.C. § 831(b).[3] Article 31(b) differs from *Miranda* in that it requires warnings whenever a service member is "suspected of an offense" and is being interrogated. It may thus apply in situations in which a service member is not in "custody." *See United States v. Baird*, 851 F.2d 376, 383 (D.C.Cir. 1988). We will discuss *Miranda* and Article 31(b) separately.

A.

In *Miranda*, the Supreme Court held that warnings must be administered before a person is subjected to "custodial interrogation," *i.e.*, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 (footnote omitted). In this case, the Army Court of Military Review concluded that Brosius was not in "custody" when he was interviewed on June 2, and the court credited testimony that Brosius "voluntarily appeared before [the CID agents] as a friend of PFC Ivon wishing to provide them with information that might lead to the apprehension of her killer." 37 M.J. at 660. Whether a person is in "custody" for purposes of *Miranda* is not a factual question entitled to the presumption of correctness, *see Thompson v. Keohane*, 516 U.S. 99 (1995), and therefore we ask whether the determination of the military courts that Brosius was not in custody is "contrary to, or

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[3] This provision states:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused. . . .

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We hold that under these standards, the determination of the military courts must be sustained.

Brosius argues that he was in custody at the time of the first interview on June 2 because his first sergeant, the highest-ranking noncommissioned officer in the unit, "sent" him to the orderly room to speak with the CID agents and because under Article 91(2) of the UCMJ, 10 U.S.C. § 891(2), Brosius was required to obey the first sergeant's orders. In making this argument, Brosius relies on the statement of Special Agent Allen that the first sergeant "sent" Brosius to the orderly room. However, when Special Agent Allen's testimony on this point is viewed in context and together with other pertinent testimony, it is apparent that there is no basis for overturning the Army Court of Military Review's determination that Brosius appeared before the CID agents voluntarily.

Special Agent Allen testified as follows:

> A. . . . [T]he First Sergeant told us there was a soldier that stated that he was with her the night before, and he asked if we wanted to see him. We said, "Yes if he's in the area you can send him down."
>
> Q. Okay. So the First Sergeant sent him down to the orderly room?
>
> A. Yes, sir.

App. 1.

Special Agent Nash explained the circumstances that led to Brosius's being "sent" to the orderly room.[4] Special Agent

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[4] Special Agent Nash's testimony on this point was apparently hearsay. Under Mil. R. Evid. 104(a), a trial judge is not bound by the rules of evidence other than those pertaining to privileges and may consider

Nash testified that Brosius "approached some of our agents or the First Sergeant, and the First Sergeant approached our agents while they were in the unit, saying that he was with PFC Ivon, and that he wanted to come and tell us what he knew about it." App. 18; *see also id.* at 30. When Brosius was asked how he had come to be interviewed at the base, he stated "[s]omebody from the orderly room . . . came down to my room where I was at the time, and said that the police, CID, wanted to speak to me about what happened the night before." App. at 80.

Viewing all of this evidence together, we see no basis for rejecting the determination of the Army Court of Military Review that Brosius appeared voluntarily. Special Agent Nash's testimony directly supports that determination, and Special Agent Allen's use of the term "sent" is easily reconcilable with his testimony. A person who has expressed a desire to speak with someone may be "sent" to see that person when the person is available. ("After some time in the waiting room, the patient was *sent* in to see the doctor.")

We thus then turn to the second interview conducted on June 2 at the River Building. Brosius argues that he was in custody at the time of this interview because, according to the opinion of the Army Court of Military Review, Special Agent Allen "instructed" Brosius to go to the River Building, 37 M.J. at 655, and, according to testimony given by Special Agent Robinson, Brosius was then "escorted" to the River Building by his section sergeant. App. 123. Brosius contends that, in the military, the word "escort" is synonymous with the word "guard." The government, by contrast, argues that Brosius had a friendly personal relationship with his section sergeant and that the sergeant simply gave him a ride to the River Building.

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hearsay in a suppression hearing. *See United States v. Dababneh*, 28 M.J. 929, 934 (N.M.C.M.R. 1989) quoting *Bourjaily v. United States*, 483 U.S. 171, 178 (1987). Hearsay may be considered in a suppression hearing in a federal court. *United States v. Raddatz*, 447 U.S. 667, 679 (1980).

The Army Court of Military Review, as previously noted, concluded that Brosius voluntarily appeared before the CID agents, and we accept that determination. Special Agent Allen testified as follows concerning the circumstances that led to Brosius's appearance at the River Building:

> Q. . . . [W]hen he said that . . . he didn't want to talk to you, what did you do?
>
> A. Well, we had several other people to talk to, and I told him "There's two lawyers down at the River Building," you know, *if he wanted to talk to a lawyer about it or if he wanted to talk to someone about it*, "go down there and someone would be glad to talk to you about it."

App. 4-5. (emphasis added). Special Agent Allen added:

> A. . . . I said, "Well, *if you don't want to talk to us*, there are attorneys down at the River Building right now, and *if you want to go down there* and talk to them about it, go ahead."
>
> Q. And then they did he?
>
> A. I think he did. He had a Sergeant there with him. I think it was his section Sergeant, whatever. I think he took him down there.

App. 13 (emphasis added).

Brosius himself said little about the circumstances that brought him to the River Building, stating only that his section sergeant, who was "an acquaintance," gave him a ride to that facility. App. 75.

Considering the relevant portions of the record that have been brought to our attention, we see no basis for rejecting the determination of the Army Court of Military Review that Brosius was not in custody when he spoke with the agents at the River Building. According to Special Agent Allen, Special Agent Robinson and he did not direct Brosius to go to the River Building but merely told him to go there "if he wanted to talk to

a lawyer about it or if he wanted to talk to someone about it." Brosius himself does not appear to have testified that he felt compelled to go to the River Building. Since the River Building was about 12 miles from the base, Brosius needed transportation to get there. Special Agent Robinson's use of the term "escorted" may simply mean that the section sergeant gave him a ride. In ordinary speech, a person who is "escorted" is not necessarily deprived of freedom of movement. If the military courts did not think that Special Agent Robinson's use of the term carried a special meaning due to the military context, we are not inclined to second guess that interpretation. Accordingly, we see no ground for holding that Brosius's *Miranda* rights were violated on June 2.

B.

We now consider Brosius's argument that the failure to give him warnings on June 2 violated his rights under Article 31(b) of the UCMJ. As noted, Article 31(b) applies whenever a service member who is "suspected of an offense" is interrogated, whether or not the member is in custody. Statements obtained in violation of Article 31(b) may not be received in evidence at a court martial against the person who made them. 10 U.S.C. § 83(d).

The parties disagree sharply about whether Brosius was a suspect at the time of the June 2 interviews. Brosius maintains that a reasonable investigator would have regarded him as a suspect immediately upon learning that Ivon had driven him back to the base alone in the early morning hours of June 2. The government argues that the agents were focusing on other suspects, chiefly Ivon's estranged boyfriend, and did not regard Brosius as a suspect.

We find it unnecessary to decide whether Brosius was "suspected" of an offense on June 2. Even if he was "suspected" and even if the statements that he provided on June 2 should have been suppressed under 10 U.S.C. § 83(d), the failure to suppress those statements was harmless error. *See*

Hassine v. Zimmerman, 160 F.3d 941, 949 (3d Cir. 1998) (in a habeas corpus proceeding, an error is harmless if it did not have a substantial and injurious effect or influence on the verdict). If the confession that Brosius made on June 4 and 5 is not suppressed, a subject that we discuss below, the statements made on June 2 were obviously harmless. As noted, at the June 2 interview, Brosius stated that: 1) PFC Ivon gave him a ride back to the base from a nightclub; 2) another male soldier rode with them; 3) she had a troubled relationship with her boyfriend; and 4) he had last seen her at about 2:55 a.m. on the morning of the murder. These statements added nothing to Brosius's later confession. Indeed, they do not appear to have added much if anything to evidence available from other witnesses or sources. Prior to the June 2 interview, Brosius had told other witnesses who testified at trial that he had driven home with the victim on the night of her murder; that he might have been the last person to see her alive; and that another person had accompanied them in the car. In addition, the log book at a gate revealed that Ivon's car had returned at 2:30 a.m. with two occupants. Accordingly, the failure to suppress evidence obtained during the June 2 interview was harmless under any standard.

Brosius, however, contends that, because warnings were improperly withheld on June 2, his subsequent confession on June 4 and 5 must be suppressed. We cannot agree. In *Oregon v. Elstad,* 470 U.S. 298 (1985), the Supreme Court considered the appropriate remedy when a suspect in custody is first interviewed without *Miranda* warnings and is later given proper warnings and interviewed again. In *Elstad,* the defendant was taken into custody for committing a burglary. *Id.* at 300-01. He was initially questioned at the scene of the arrest and made an incriminating admission. *Id.* After he was taken to the police station, *Miranda* warnings were given, he signed a written waiver, and confessed to the crime. *Id.* at 301-02. The state appellate court held that, even if the confession had not resulted from actual compulsion, the defendant's initial statement had a coercive impact because it had let the "'cat . . .

out of the bag.'" *Id.* at 303 (citation omitted). The state appellate court consequently held that the later statement had to be suppressed. *Id.*

The Supreme Court reversed, holding that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. The Court added that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314.

That is precisely what occurred here. Brosius made unwarned statements on June 2. He went home, and two days passed. On June 4th, he was called back for a second interview. He was then given proper warnings, and he subsequently confessed. There is no reason to believe that these later statements were not "knowingly and voluntarily made." *Elstad,* 470 U.S. at 309.

Brosius argues that the circumstances surrounding the interview at the River Building were improper because Brosius was led to believe that Captain Ewing, who was actually a member of the prosecution team, was serving as Brosius's attorney. The government responds that, although Captain Ewing had previously represented Brosius in an unrelated matter, Captain Ewing and the agents made it clear that Captain Ewing was working with the prosecution in relation to the Ivon murder investigation.

Captain Ewing's role at the June 2 interview at the River Building was inadvisable, but it does not call for the suppression of the confession that Brosius provided days later after receiving proper warnings. Brosius relies on the statement in *Elstad* that a prior failure to warn may call for the suppression of a subsequent statement made after receiving proper warnings if "deliberately coercive or improper tactics"

were used in the first interrogation. 470 U.S. at 314. This rule, however, relates to situations in which the tactics used in the first, improper interrogation had a coercive effect that led to the later admissions. Nothing of that sort happened here. As we have noted, Brosius did not provide any new, incriminating information during the interviews on June 2. He was not even in the position of the defendant in *Elstad*, who had "let the cat out of the bag" when he was initially questioned. Brosius's statements during the June 2 interviews cannot have coerced him to make his subsequent confession.

IV.

Brosius's final argument is that his confession should be suppressed under *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the Supreme Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Id.* at 484- 85. Brosius maintains that he requested counsel during the interview on June 2 and therefore his subsequent questioning without counsel was improper.

We reject Brosius's *Edwards* argument. Edwards applies only where the suspect makes a request for counsel *while in custody*. *See, e.g., United States v. Wyatt*, 179 F.3d 532, 536 (7th Cir. 1999) (citing cases); *United States v. Bautista*, 145 F.3d 1140, 1146 (10th Cir. 1998); *cf. Alston v. Redman*, 34 F.3d 1237, 1249 (3d Cir. 1994) (*Edwards* does not apply where counsel was requested outside the context of "custodial interrogation"). Here, because Brosius was not in custody on June 2, *Edwards* does not apply.

V.

For these reasons, we affirm the order of the District Court.

125 F. Supp. 2d 681

UNITED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Michael Todd BROSIUS, Petitioner,

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA., Respondent.

No. Civ.A.1:CV-99-1387.

Dec. 13, 2000.

MEMORANDUM

CALDWELL, District Judge.

I. *Introduction.*

In 1990, Michael Todd Brosius, then a member of the United States Army, was charged in a military court-martial with premeditated murder under Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918. He was convicted of unpremeditated murder and sentenced to life imprisonment, later reduced to seventy-five years.

Brosius, an inmate at USP-Lewisburg, Pennsylvania, has filed a counseled petition for a writ of habeas corpus under 28 U.S.C. § 2241. Asserting that he was in custody and also objectively a suspect at the time, he argues that inculpatory statements he made to Army investigators were obtained in violation of his Fifth Amendment right against self-incrimination, and his right to remain silent under both *Miranda v. Arizona*, 384 U.S. 436 (1966), and military law at

Article 31, UCMJ, 10 U.S.C. § 831(b). He also contends that the statements were obtained after two requests for a lawyer were ignored. Finally, he maintains that the lawyer the Army supposedly provided for him, but who was really a prosecutor and not acting on his behalf, had an ethical conflict that compounds the violations. He has filed a motion requesting oral argument or a hearing on his claims.

II. *Background.*

At about 4:40 a.m., on June 2, 1990, at a United States Army base in Giebelstadt, Germany, Private First Class Tammy Ivon was discovered near death from multiple stab wounds. She later died from the injuries.

The Army's Criminal Investigation Division (CID) began an investigation that morning. During the course of that investigation, on the evening of June 2, CID officers had a brief interaction with the petitioner and then later interviewed him. He was not advised of his rights on either occasion. The questioning led to additional interviews on June 4 and 5. On those occasions, Brosius was advised of his rights, including his right to remain silent and to have the assistance of an attorney, and he executed signed waivers of his rights. As a result of the questioning on the latter two days, Brosius made a written confession, dated June 6. At the close of this statement, he stated, "I don't believe I did it and if I did I want help. I feel like I falsified the whole statement." *United States v. Brosius*, 37 M.J. 652, 657 (A.C.M.R. 1993). All of the petitioner's statements were used against him at trial. There was no forensic evidence tying him to the crime. *Id.* at 655.

Brosius focuses on the propriety of the June 2 questioning, asserting that this questioning was violative of his constitutional rights and of his rights under military law, tainting the statements given later. For the first time, he also argues in this petition that the questioning on June 4 and 5 was improper because it failed to scrupulously honor his invocation of the

right to remain silent on June 2, citing *Michigan v. Mosley*, 423 U.S. 96.

Immediately before the court-martial, the June 2 questioning was the subject of an October 9, 1990, suppression hearing under Article 39(a), UCMJ, 10 U.S.C. § 839(a). CID agents Douglas M. Allen and Mark Nash testified at the hearing, along with the petitioner. After hearing the testimony, the military judge presiding over the court-martial denied Brosius's motion to suppress, making certain findings of fact. We provide the following summary of the hearing, taken from respondent's exhibit 1 in doc. 26 and petitioner's exhibit 2 in doc. 33.

Allen testified at the suppression hearing as to his contact with Brosius on the day of June 2, 1990. Allen and Tyrone Robinson were two of the agents investigating the killing. At that time, the CID already had two suspects, Private First Class David Sparks, Ivon's boyfriend, and Specialist Randy Hestekin, Sparks's roommate. Allen had taken Sparks to the hospital that day for a sexual-assault determination, (Doc. 26 at 138), and Hestekin had returned to the base in the early morning hours with blood on his shirt, signaling another soldier to be quiet when he was seen. (*Id.* at 158).

Allen was interviewing witnesses in the orderly room of "HHP, 8/43" in Giebelstadt, (Doc. 33 at 135), "a whole string of guys waiting to talk." (*Id.* at 136). The first sergeant told the agents "there was a soldier that stated that he was with her the night before," and the first sergeant "asked" if they "wanted to see him." *Id.* They replied, "Yes, if he's in the area you can send him down." *Id.* The first sergeant then "sent him down." *Id.*

Nash testified that no one from the CID requested that Brosius be sent to them. Although not based on personal knowledge, he said that Brosius "approached some of our agents or the First Sergeant" and said that he wanted to provide information. (*Id.* at 152-53).

Brosius testified that he could not remember telling anyone that he had been with Ivon the night before or that he had wanted to speak to the police about it. (*Id.* at 215). He said that he spoke with the CID because someone from the orderly room came to his room and said that the CID wanted to speak to him about it. *Id.*

Brosius came to the orderly room in the evening. He paced around and seemed upset. Allen and Robinson took him into the first sergeant's office. Brosius said that if he saw Sparks or Hestekin, he would do them bodily harm, (*id.* at 138), that Ivon had been like a sister to him. (*Id.* at 147). He also told the agents "he was with Ivon the night before. That there was someone else with them." (*Id.* at 137). She had given him (and the other man) a ride back to the base. (*Id.* at 138). Allen asked who the third person was. According to Allen, Brosius replied, "Well, I don't want to say anything about it." (*Id.* at 137). Allen continued, "He didn't want to tell me because he said that he didn't want to say anything unless his first sergeant or a lawyer or someone with his interests was standing there to hear what we were saying, and writing it down or whatever." (*Id.* at 139, 148). Allen had "several other people to talk to," *id.*, so he told Brosius there were two lawyers at the River Building, and if he wanted to talk to a lawyer or someone, to go there. (*Id.* at 139).

The River Building was in Wuerzburg, about twenty kilometers away, where the CID office and military police are located. (*Id.* at 148-49). On cross-examination, Allen admitted he did not know why they did not bring the first sergeant in during any questioning if Brosius had mentioned him as a witness. (*Id.* at 146). Allen did not consider Brosius a suspect at that time. If he had he would have advised him of his rights. (*Id.* at 142). Brosius's section sergeant, a supervisory noncommissioned officer, also described as an "acquaintance of Brosius," (*Id.* at 210), drove the petitioner to the River Building. (*Id.* at 148).

Brosius recalled the conversation differently. He testified he said he would not say anything until he had a lawyer present. He did not remember mentioning the first sergeant, although he admitted it was possible. (*Id.* at 206, 215).

At the River Building, CID officer Mark Nash questioned the petitioner. Nash testified as follows. Brosius waited his turn like everybody else. (*Id.* at 150). Like the other interviews, it was conducted in the polygraph suite and a written statement was taken in Nash's office. Nash did not advise Brosius of his rights. (*Id.* at 152). Another CID agent, David Schindler, was also present at the interview. (*Id.*).

According to Nash, Captain Harper M. Ewing, the prosecutor assigned to the case, was also there because Brosius had said that he wanted a "witness" present so that the CID did not misconstrue his words. (*Id.* at 152). Nash told Brosius that Ewing "was with the prosecuting office, and that he was a prosecuting attorney." (*Id.* at 154). Petitioner's response to that was "That's fine." *Id.* Because Brosius appeared nervous, Nash also told him before the interview that Sparks was their main suspect and that if he was "worried about rights or anything being violated, if you start to say anything that we think would be incriminating against you, we would stop you and advise you of your rights." (*Id.* at 154-55). Petitioner replied, "Okay." *Id.* In the past, Nash had given this same advice to other witnesses and to victims as well. (*Id.* at 167). Nash thought Brosius was agitated because Ivon had been a friend. (*Id.* at 154).

Ewing testified that he told Brosius that he "was working with the cops," (*id.* at 178), so Brosius would know that he "was not there specifically for him." (*Id.* at 179). When asked why he did not simply make that clear, he said that he thought that informing petitioner that he was working with the MPs would be enough. *Id.* He also said that he (Ewing) had been told that one of the CID agents had informed Brosius that he was the prosecutor in the case. *Id.*

On cross-examination, the following exchange occurred:

Q. . . . The phrase, "I want a lawyer because I don't trust the cops because they'll twist my words," did you hear that phrase that day?

A: I think so.

Q: Did you hear Specialist Brosius use that phrase?

A: I think I did, yes, or something similar.

Q: Was that what you thought he wanted a lawyer for?

A. Yes.

(*Id.* at 184).

Brosius testified that he did not remember being told that Ewing was a prosecutor but that Ewing informed him that he "worked with the cops." (*Id.* at 207). Even though Ewing worked with the cops, Brosius still thought Ewing was his assigned lawyer because "a lawyer was a lawyer," (*id.* at 208), because Ewing had worked on a legal matter for him before, (*id.* at 207), and because Ewing was with him while he was being interviewed by Nash and Schindler. (*Id.* at 208). Petitioner never asked Ewing if he had been assigned to him. (*Id.* at 209). Not did he testify that while he was at the River Building he had requested a lawyer. Additionally, while he was being questioned on June 4 and 5, he never asked to see his "assigned" lawyer, Captain Ewing. (*Id.* at 211).

Ewing did not recognize Brosius, but Brosius recognized Ewing as the lawyer who had assisted him in a civil matter a few years before. Ewing asked Brosius about the civil matter (and apparently satisfied himself that there was no conflict since the previous matter was not related to the criminal investigation). (*Id.* at 178). On June 6, 1990, Ewing was removed as the prosecutor. (Doc. 33, exhibit 5).

Ewing's presence at the questioning in the polygraph suite came about after Captain Robin Hall, senior trial defense

counsel, consulted with Major John King, the deputy prosecutor, who approved of Ewing's presence. (*Id.* at 182). In all the other interviews, Ewing stood outside the suite, observing through a two-way mirror. (*Id.* at 166). Nash never thought to have Hall attend rather than Ewing because Brosius was not a suspect or an accused at that time. (*Id.* at 163).

The interview proceeded with Brosius's cooperation. (*Id.* at 155). He gave information freely. (*Id.* at 159). At that time, both Sparks and Hestekin were being held in cells at the MP station. (*Id.* at 157-58). Nash concentrated his questioning on Sparks and his relationship with the victim. (*Id.* at 156). During the interview, Brosius never sought legal advice from Ewing. (*Id.* at 163). He voluntarily made a sketch of the parking lot where Ivon let him out. (*Id.* at 168). Eventually, Brosius did sign a written statement that night about 10:10 p.m. The statement indicated that the victim had given Brosius a ride back to the base from a night club, that she had also given another male soldier a ride back, that she and Sparks had a troubled relationship, and that petitioner had last seen her around 2:25 a.m. on the morning of June 2. (Doc. 33, exhibit 1).

Nash testified that the petitioner was there of his own free will. They never told him he could leave, but he was there simply to help the CID officers. (*Id.* at 159). Brosius left at the end of the interview, returning to his unit. (*Id.* at 161). However, before he left, the CID agents took his clothing because it was the same clothing he had worn to the night club. (Doc. 33, exhibit 4).

According to Nash, petitioner only became a suspect on the morning of June 3 when the CID investigators had a meeting about the case. (*Id.* at 171-72). They focused on him because he had said there was another person in Ivon's car, but the gate guard logs indicated only two persons had been in the car when it returned to the base early on the morning of June 2. (*Id.* at 173). Nash also said there was some other evidence leading to Brosius that could be described by agent Schindler and another agent named Blackmon. (*Id.* at 173). However, this other

evidence was never specified. Nash did not detail how the shift in focus to petitioner happened, but he did mention earlier in his testimony that "Hestekin was a very strong suspect until we started verifying his alibis." (*Id.* at 158). Nothing was said about how Sparks was dropped from the investigation.

Nash knew about the logs before he interviewed petitioner, and they were "looking aggressively for that one person" noted by the guards. (*Id.* at 160). Shortly before the interview or just as it began, he found out that Brosius had said there was a third person in the car. (*Id.* at 160-61). He did not consider this suspicious at the time since from his own experience on guard duty, guards can be mistaken. (*Id.* at 161).

Ewing testified that he asked questions only toward the end of the interview. (*Id.* at 180). He asked Brosius about the third person in the car. Brosius gave a graphic description. (*Id.* at 181). Later, Ewing told the CID to track this person down. *Id.*

Ewing did not know that the gate guards had noted only two people in the car until after the interview. (*Id.* at 185). This knowledge "would have led him" in the "direction" of making Brosius a suspect. (*Id.* at 185).

In denying the suppression motion, the military judge made the following findings of fact, in pertinent part:

. . . .

4) At the beginning the CID had two suspects, Sparks and Hestekin.

5) On the morning of 2 June, both of those individuals were apprehended.

6) In the afternoon of 2 June, Special Agent Allen and others began interviewing members of the accused's battery.

7) The accused's First Sergeant, Flynn, told Special Agent Allen that there was a soldier who was in his battery, who was with the victim that night.

8) The CID told the First Sergeant that they wanted to interview this soldier.

9) This soldier was the accused and he was called to the orderly room.

10) The accused there met Special Agent Allen and another CID agent.

. . . .

12) In the office and even outside the accused was pacing. His fists were clenched. He said the victim was like his sister. He wouldn't sit down. He also indicated that he wanted to do bodily harm to Sparks and Hestekin.

13) The accused told the CID that he would talk, but he wanted a lawyer or his First Sergeant present.

14) Allen told the accused if he wanted a lawyer, he should go over to the River Building which is the CID headquarters in Wuerzburg.

15) The accused then went to the CID headquarters with Pickett [the Section Sergeant].

16) At the building the accused met Special Agent Nash.

. . . .

19) The accused spoke briefly with Ewing and reminded Ewing that Ewing had represented the accused in a legal assistance matter about 2 years previous to that time.

20) Ewing told the accused that he was then working with the cops.

. . . .

24) In the polygraph suite the conversation was calm.

. . . .

26) During both interviews the accused mentioned that a third person was in the car with the accused and the victim.

27) Nash at the time believed that the accused was not a suspect.

28) On the next day in the CID meeting, the fact that the accused said there were three in the car, and a gate guard said he only saw two, along with other evidence, caused the CID to believe that the accused should be considered a suspect.

. . . .

37) Special Agent Allen did not suspect the accused of criminal involvement in the death of the victim.

38) There were no grounds for him to do so.

39) He was not required to give the accused a warning.

40) The request for counsel from the accused at that time was not for the purpose of representing him, or to have counsel deal with the police for him.

41) If the accused had a purpose other than as a ploy or ruse, it was to have an impartial observer.

42) At the River Building the accused did speak to Captain Ewing.

43) The accused was clearly advised by Captain Ewing, that Ewing was not representing him.

44) No reasonable man under the circumstances could believe that Ewing was representing the accused.

45) The accused knew that Ewing was not representing him.

46) Agent Nash did not suspect the accused of criminal involvement.

47) Nash had no reasonable grounds to believe that the accused was culpably involved.

48) That the accused said three people were in the car is as readily explainable as the gate guard making a mistake.

49) Ewing did not act in any way as the accused's counsel in the interview in the polygraph suite.

50) The accused's nervousness in Nash's office after the interview when the four were present, was not reasonable grounds to suspect him.

51) After all, his friend had just been murdered.

52) On 4 and 5 June the accused was properly warned of his rights under Article 31 and *Miranda, Tempia.*[1]

53) On those dates the accused voluntarily and knowingly, and intelligently waived all of his rights.

54) The accused testified that he didn't have counsel there because he believed Ewing was his lawyer and working on his behalf.

55) I find this statement to be not factual.

56) I find that the accused knew Ewing was not his lawyer and not working on his case, or in his behalf.

57) I find that the accused was not confused in any way about Ewing's position.

(*Id.* at 224-25) (brackets and footnote added).

The military judge concluded as follows:

To recap, I find as follows:

Neither Allen nor Nash believed, nor reasonably believed, nor should they have reasonably believed, that the accused was a suspect on 2 June 1990. That no ground existed for them to believe that the accused was a suspect.

I find that Ewing did not represent the accused. I find that the accused knew that Ewing did not represent him. I find

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[1] *United States v. Tempia,* 37 C.M.R. 249, 1967 WL 4235 (C.M.A. 1967), extended *Miranda* to military personnel.

> that the accused never made a request for counsel to advise him or represent him. I find that the request for counsel was, at most, a ploy or a ruse by the accused. At best it was a request for an impartial observer.
>
> I find that the accused properly waived his rights to counsel after being properly advised of all his rights. I find that the accused never requested counsel to represent him, so *Edwards versus Arizona* does not apply.

(*Id.* at 229-30).

There was also some testimony at the investigation hearing held under Article 32, UCMJ, 10 U.S.C. § 832,[2] on which the petitioner also relies. CID agent Schindler admitted they were "walking the gray area" in the way they questioned Brosius. (Doc. 33, exhibit 2 at 782). Nash stated at that hearing: "I'll be honest, sir. I believe that what was stated was, 'That we do have an attorney here. Okay, you requested one. You know—'" (*Id.* at 877).[3]

III. ***Appellate History.***

After his conviction, Brosius appealed to the United States Army Court of Military Review (now the Army Court of Criminal Appeals). Unlike civilian appellate courts, this court has the authority to review the factual findings of the military judge.[4] The petitioner contested, among other things, the

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[2] An Article 32 hearing is apparently the military counterpart to a grand-jury proceeding.

[3] Although at the same time Nash also said that it was made clear to Brosius that Ewing "was working either as a prosecutor or the cops or whatever." *Id.* Also, Nash stated that Brosius's response was: "Okay. That's cool. I just want somebody to witness what I was saying to you guys." *Id.*

[4] At the time of Brosius's court-martial, Article 66, UCMJ, 10 U.S.C. § 866(c), provided as follows:

military judge's decision not to suppress his statements. Specifically, he argued that Nash should have read him his rights at the River Building because he was then objectively a suspect, he was in custody, and he had asked to see a lawyer. (Doc. 26, exhibit 3 at 6). As part of the argument concerning custody, the petitioner contended that he had to report to the orderly room or he could have been disciplined for failing to follow orders, citing *United States v. Tempia,* 37 C.M.R. 249, 1967 WL 4235 (C.M.A. 1967). (*Id.* at 7).

The Court of Military Review rejected this argument on the basis of the following factual recitation:

> Unfortunately for the appellant, the evidence does not support his characterization of the events of 2 June. The appellant was neither in custody nor reasonably suspected of killing PFC Ivon by the CID agents with whom he spoke on that date. The CID agents testified that the appellant voluntarily appeared before them as a friend of PFC Ivon wishing to provide them with information that might lead to the apprehension of her killer. The fact that he was distraught or grief-stricken would not lead a reasonable criminal investigator to have suspected him of an offense since that is not suspicious behavior from a friend of a crime victim.
>
> Moreover, the appellant's request that a lawyer be present while he spoke with the CID did not, under the circumstances, constitute a request for legal counsel even

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(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(c) now refers to the Court of Criminal Appeals.

> assuming there was a custodial interrogation. Invocation of the right to counsel must be unequivocal and unambiguous. *United States v. Schake,* 30 M.J. 314, 317 (C.M.A. 1990); *United States v. Dock,* 35 M.J. 627 (A.C.M.R. 1992), pet. granted, 38 M.J. 173 (C.M.A. 1993). While the appellant said that his purpose for requesting that CPT Ewing be present was to look out for "his interests," in context, he was referring to something other than his potential culpability for the killing. We therefore reject this assigned error as unmeritorious.

United States v. Brosius, 37 M.J. 652, 660 (A.C.M.R. 1993).

The petitioner then appealed to the United States Court of Military Appeals (now the Court of Appeal for the Armed Forces), raising the same issue. On this appeal, he argued that he was a suspect based on the additional fact that his clothing had been taken after the questioning at the River Building, reasoning that the police do not seize the clothing of witnesses. (Doc. 26, exhibit 6 at 40, 42).

The Court of Military Appeals granted review and then on January 26, 1994, summarily affirmed without opinion the decision of the Army Court of Military Review. *United States v. Brosius,* 39 M.J. 378 (C.M.A. 1994). (Doc. 26, exhibit 7).

This habeas petition followed on August 4, 1999.

IV. *Discussion.*

A. *Standard of Review.*

The plurality opinion in *Burns v. Wilson,* 346 U.S. 137 (1953), has been taken as establishing that a civilian court may only review decisions of military courts to determine if the latter gave the petitioner's claims full and fair consideration. *See Levy v. Parker,* 478 F.2d 772, 782-83 (3d Cir. 1973), *rev'd on other grounds,* 417 U.S. 733 (1974); *Jordan v. Warden,* 1998 WL 614694, at *2 (M.D.Pa.). If the military courts have done so, then the inquiry is at an end, and the

habeas petition must be dismissed. *Lips v. Commandant,* 997 F.2d 808, 811 (10th Cir. 1993); *Jordan, supra,* 1998 WL 614694, at *2.

The courts have had some difficulty in applying the "full and fair consideration" test. *See Levy, supra,* 478 F.2d at 781 n. 9 (the test is "easy to state, but difficult to define and to apply") (quoted sources omitted); *Kauffman v. Secretary of the Air Force,* 415 F.2d 991, 997 (D.C.Cir. 1969) (the test "has meant many things to many courts"); *Dodson v. Zelez,* 917 F.2d 1250, 1252 (10th Cir. 1990) ("The federal courts' interpretation—particularly this court's interpretation—of the language in *Burns* has been anything but clear.").

However, it appears that the test has been channeled somewhat by a four-factor analysis expressed in *Calley v. Callaway,* 519 F.2d 184 (5th Cir. 1975) (en banc). In *Calley,* the Fifth Circuit stated that before a federal court can act on a habeas petition challenging a conviction under military law, the following factors should be considered:

> 1. The asserted error must be of substantial constitutional dimension . . . or so fundamental as to have resulted in a miscarriage of justice.

Id. at 199 (italics omitted).

> 2. The issue must be one of law rather than of disputed fact already determined by the military tribunal.

Id. at 200 (italics omitted).

> 3. Military considerations [must not] warrant different treatment of constitutional claims.

Id. (italics omitted) (brackets added).

> 4. [Whether] [t]he military courts [did not] give adequate consideration to the issues involved and appl[ied] [im]proper legal standards.

Id. at 203 (italics omitted) (brackets added). *See also Dodson, supra,* 917 F.2d at 1252-53 (approving use of the *Calley* test and noting that it was presaged by Tenth Circuit cases). We will use this test in disposing of the instant petition.[5]

We elaborate here on the second factor. In regard to the facts, we will not reevaluate or reassess the evidence. *See Burns, supra,* 346 U.S. at 144; *Dodson, supra,* 917 F.2d at 1254; *Jordan, supra,* 1998 WL 614694, at *2 ("It is not the function of the civil courts to reevaluate or reassess the evidence previously presented to the military courts."). We will review certain mixed questions of law and fact, such as whether the petitioner was in custody, *see Thompson v. Keohane,* 516 U.S. 99 (1995), or a suspect. *See United States v. Muirhead,* 51 M.J. 94 (U.S.A.F.); *United States v. Meeks,* 41 M.J. 150 (C.M.A. 1994). But we will not disturb the military courts' underlying findings of narrative or historical facts, *see Thompson, supra,* an approach especially proper, of course, when the parties have presented conflicting evidence.

B. *The Petitioner's Claim That He Was a Suspect on the Evening of June 2, 1990.*

The Petitioner argues that he became a suspect during his interaction with CID agent Allen on June 2 and was entitled to the rights warnings set forth in Article 31(b), UCMJ, 10 U.S.C. § 831(b). Article 31(b) requires that, before being interrogated, a suspect must be told that he can remain silent and that any

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[5] We reject the respondent's contention that the Tenth Circuit in *Lips, supra,* decided after *Dodson,* retreated from the *Calley* test. *Lips* set forth the *Calley* test as part of it analysis. Additionally, the Tenth Circuit has continued to rely on the *Calley* test after *Lips. See Reed v. Hart,* 17 F.3d 1437 (10th Cir. 1994) (unpublished disposition in Westlaw at 1994 WL 60398); *King v. Berrong,* 25 F.3d 1057 (10th Cir. 1994) (unpublished disposition in Westlaw at 1994 WL 161336). District courts within that Circuit have also done so. *See White v. Nickels,* 2000 WL 1073716 (D Kan.).

statement he makes can be used against him at a court-martial. It provides as follows:

> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

The Article is the military parallel to *Miranda* warnings, but as noted by the Court of Appeals for the Armed Forces, unlike in the *Miranda* setting, Article 31(b) warnings are required whenever a person is a suspect, not when the person is also in a custodial situation. *United States v. Swift,* 53 M.J. 439, —(U.S.A.F. 2000).

To determine if a person is a suspect, an objective standard is used in most cases. "The question is whether a reasonable person would consider someone to be a suspect under the totality of the circumstances." *Muirhead, supra,* 51 M.J. at 96 (citing *Meeks, supra; United States v. Schake,* 30 M.J. 314 (C.M.A. 1990)). However, "in some cases, a subjective test may be appropriate; that is, we look at what the investigator, in fact, believed, and we decide if the investigator considered the interrogated person to be a suspect." *Muirhead,* 51 M.J. at 96.

In support of his claim that he was a suspect, Brosius argues the following. First, the CID knew before he was questioned that the victim Ivon had entered the base in her own car and that the gate guards had recorded only one other person in the vehicle. Second, as Nash testified, the CID had already been "looking aggressively for that one person" at the time of the interview. Third, Allen knew that Brosius was that person when the petitioner told him that Ivon had given him a ride back to the barracks. Fourth, Ewing testified that if the CID agents had told him there was a conflict between Brosius's statement

that there was a third person in the car and the gate guards' logs, he would have been led to suspect the petitioner.

Further, and most importantly, this conflict concerning the number of persons in the car was the only specific item of evidence the prosecution presented at the suppression hearing as justifying the shift in focus from Sparks and Hestekin on June 2 to Brosius on the morning of June 3. Yet this was not new information; the CID knew it as soon as Brosius told Allen there was a third person in the car. Nash did testify to "other evidence" that aroused their suspicion of the petitioner, but that other evidence was never forthcoming at the hearing and still is not known. Countering the argument the respondent makes below about the two existing suspects, Sparks and Hestekin, the petitioner argues that the existence of other suspects did not make him a nonsuspect, since there is no rule against there being more than one or two suspects in a case.

Moreover, after the questioning was over at the River Building, the CID took the petitioner's clothing for analysis since he told them it was the clothing he had worn to the night club. Because witness clothing is not normally seized, the petitioner presents this as an additional reason that he was objectively a suspect on June 2 and should have been read his Article 31(b) rights.

In opposition, the respondent argues that Brosius could not reasonably have been considered a suspect on June 2. First, both Allen and Nash testified that neither one considered him a suspect. Second, the totality of the circumstances support their testimony. On June 2, the CID already had two suspects, Sparks, Ivon's boyfriend, and Hestekin, Sparks's roommate. At the time, it was known that Sparks had a troubled relationship with Ivon and that Hestekin had returned to the barracks on the morning of the murder with blood on his shirt, signaling another soldier to be quiet when he was seen. Both of these men had been read their rights and both were being held in custody. Sparks had been sent to the hospital for a sexual-assault determination.

Further, Nash's questioning focused on Sparks, not Brosius. And Brosius's responses would not have diverted that focus; Brosius was cooperative, providing incriminating evidence about Sparks and even remarking that he wanted to do harm to Sparks and Hestekin. He voluntarily made a sketch of the parking lot where Ivon let him off.

Additionally, as Nash testified, the conflict between the gate guards' logs and Brosius's statement that there was a third person in the car would not, and did not, arouse suspicion because the guards could have been mistaken by not seeing the third person.

Finally, the respondent points to one specific circumstance that did change by the morning of June 3, although not relied upon by the military judge or the appellate military courts; Hestekin's alibis were proving to be true, thus leading investigators to consider Brosius.

We reject the petitioner's claim that he was a suspect at any time on June 2. Using the fourth *Calley* factor, we conclude the military courts applied the proper legal standard to this military-law issue and gave it full and fair consideration, even if other jurists might have decided it differently.

The petitioner has hinged his argument on whether he should have been considered a suspect under an objective standard. This is generally the test to apply. However, under military law, as noted in *Muirhead, supra,* "in some cases, a subjective test may be appropriate; that is, we look at what the investigator, in fact, believed, and we decide if the investigator considered the interrogated person to be a suspect." 51 M.J. at 96. The only limitation on this standard is that reliance cannot be made on the bare representation of the investigators that they did not consider the defendant a suspect. *Id.* at 97 (disapproving of heavy reliance on such statements). It is apparent that the military courts implicitly took into account the subjective beliefs of agents Allen and Nash, and that it was proper to do so in this case.

The military judge made certain central findings on this issue. He found that both Allen and Nash did not believe that Brosius was a suspect on June 2. This was an entirely proper finding as to Allen since nothing in the record indicates that he personally knew about the gate-log entry. The conclusion was further supported as to Nash because the conflict with Brosius's statement was explainable by a gate guard's mistake. Additionally, Brosius's agitated condition would not have arouse suspicion because it was normal for someone who had just lost a friend.

The other findings also support an honest belief on the part of investigators that Brosius was not a suspect. As detailed above, the CID already had two valid suspects in custody, Sparks and Hestekin. The petitioner met Allen while Allen was interviewing a number of soldiers and was apparently ready to supply Allen with incriminating evidence on Sparks. Brosius did in fact supply that information, along with threats to Sparks and Hestekin. Thus, there was objective evidence in the record to support the agents' personal belief that Brosius was not a suspect.

We note that the petitioner relies on the seizure of his clothing at the end of the June 2 interview at the River Building to support his claim that he had to have objectively been a suspect on that date. This argument was presented on appeal to the Court of Appeals for the Armed Forces and rejected. Given the totality of the circumstances test we must apply here, we will not disturb the conviction on this basis alone since we can only decide whether the military courts gave full and fair consideration to the claim, not whether we would have made the same decision in their place. That the court's affirmance was without discussion does not affect our conclusion. *See Watson v. McCotter,* 782 F.2d 143, 145 (10th Cir. 1986); *Jordan, supra,* 1998 WL 614694, at *3.

C. *The Petitioner's Claim That he Was in Custody, and Subjected to Custodial Interrogation, on June 2, 1990.*

The Petitioner argues that he was in custody when he entered the orderly room on June 2, 1990, to meet with CID agents Allen and Robinson, and continued in custody until the end of the interview with CID agent Nash at the River Building. In support, he relies on the exchange between Allen and Brosius's first sergeant when the first sergeant asked Allen if the CID agents "wanted to see" Brosius, and the reply was "Yes, if he's in the area you can send him down." The first sergeant then "sent him down." Brosius was then taken to the River Building by his Section Sergeant. At the River Building, Nash took over the questioning and did not tell Brosius he could leave at any time.

The petitioner also relies on the military judge's findings of fact. The military judge made the following findings of fact bearing on the custody issue:

> 7) The accused's First Sergeant, Flynn, told Special Agent Allen that there was a soldier who was in his battery, who was with the victim that night.
>
> 8) The CID told the First Sergeant that they wanted to interview this soldier.
>
> 9) This soldier was the accused and *he was called to the orderly room.*
>
> . . . .
>
> 15) The accused then went to the CID headquarters with Pickett [the Section Sergeant].

(Doc. 26 at 225-26) (brackets added) (emphasis added by the petitioner).

In opposition, the respondent asserts that the exchange between the first sergeant and Allen did not result in an order. Additionally, Allen let Brosius leave to seek a lawyer at the River Building, and while he was driven there by his first

sergeant, the first sergeant was an acquaintance of his. Further, after Nash completed the questioning at the River Building, Brosius left and returned to his unit. The respondent maintains that this was not custody.

The respondent cites no case law in his support. Brosius relies on *Tempia, supra,* 37 C.M.R. 249, 1967 WL 4235, and *United States v. Granda,* 29 M.J. 771 (A.C.M.R. 1989).[6] We think the petitioner reads too much into these cases. In *Tempia,* the Army Court of Military Appeals held that when a suspect "was . . . called to" the investigator's office, 37 C.M.R. at 252, 1967 WL 4235, "for interrogation," *id.* at 256, 1967 WL 4235, there was custodial interrogation, requiring *Miranda* warnings. The court stated:

> The test to be applied is not whether the accused, technically, has been taken into custody, but, absent that, whether he has been "otherwise deprived of his freedom of action in any significant way." *Miranda, supra,* at page 444. Here, the accused was clearly summoned for interrogation. Had he not obeyed, he would have undoubtedly subjected himself to being penalized for a failure to repair. Code, *supra,* Article 86, 10 U.S.C. §§ 886; Manual for Courts-Martial, United States, 1951, paragraph 127b. In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action. *See People v. Kelley,* 66 Cal. 2d 232 (1967). Hence, we conclude there was "custodial interrogation" in this case.

Id. at 256, 1967 WL 4235.

Granda dealt with the issue of whether the CID had initiated contact with a suspect who had previously invoked his

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[6] He also cited the concurring opinion of Judge Cox in *United States v. Lincoln,* 42 M.J. 315, 322 (U.S.A.F. 1995).

Miranda rights. In *Granda,* the Army Court of Military Review held that when the suspect's commander was "requested" to send the suspect to the CID office for interrogation, the suspect had been ordered to report to the office and the subsequent questioning had thus been initiated by the CID.

For Brosius, these cases provide support only for the proposition that when Allen told the first sergeant to "send him down" to the orderly room and the first sergeant did so, Brosius was ordered to appear before the agents. But these cases do not say that an order by itself creates custody, and in both cases, unlike here, the defendant was a suspect who had been ordered to appear for interrogation.

As established above, Brosius was not a suspect on June 2, and the real issue is not whether he had been ordered to appear but, as *Tempia* noted, whether he had been deprived of his freedom of action in any significant way. Contrary to the petitioner's assertion, an order to appear does not automatically place a soldier in custody. In the Fourth Amendment context of a seizure of the person, obeying an order to report is only "one of the factors to consider under the totality of the circumstances, in determining whether a seizure has occurred." *United States v. Thomas,* 21 M.J. 928, 933 (A.C.M.R. 1986). Thomas cited *United States v. Schneider,* 14 M.J. 189 (C.M.A. 1982), also a Fourth Amendment case. In *Schneider,* the Court of Military Appeals decided that there was probable cause to take a suspect into custody, and hence his seizure was legal, but felt the need to state that:

> In reaching our decision we do not wish to be thought to hold that every interrogation at the "police station" amounts to custodial interrogation. The conditions under which an accused comes to the office bear examination: Did he report voluntarily? Was he ordered to report? Was he brought in under guard? Was he a suspect? Further, what relation do these conditions have to the interrogation? Was the accused free to leave at any time? May he depart by himself? Must

> he remain under guard? Lastly, do these conditions directly relate causally to the accused's decision to make a confession?

Id. at 195 (footnote omitted).

In the instant case, as noted by the respondent, the petitioner was cooperative at all times, eventually leaving at the end of the interview at the River Building to return to his barracks. He was never told he could leave, but he never asked to leave, which was consistent with a witness cooperating with authorities, not a suspect.

Additionally, we cannot ignore the factual finding of the Army Court of Military Review, concluding that "the appellant voluntarily appeared before [the CID agents] as a friend of PFC Ivon wishing to provide them with information that might lead to the apprehension of her killer." 37 M.J. at 660 (brackets added). This finding has a basis in the record from Nash's testimony.

We conclude that we should not disturb the military courts' ruling that Brosius was not in custody.

D. *The Petitioner's Request For Counsel.*

Citing *Davis v. United States,* 512 U.S. 452 (1994), and *Edwards v. Arizona,* 451 U.S. 477 (1981), Brosius argues that counsel should have been appointed for him after he requested a lawyer twice, first in the orderly room and, second, at the River Building. Despite the military courts' finding that the first request was ambiguous, he insists that the circumstances indicate he clearly requested counsel at that time. He also argues that, in any event, the second request was unequivocal.

He also maintains that the military courts applied an incorrect legal standard to the request for counsel by examining the motive for the request. He contends that the request should have been honored once it was made and that his motive for seeking counsel was irrelevant. Further, in any event, the military courts' proffered motives, an impartial observer and

someone to look out for the petitioner's interests, were proper ones for seeking an attorney, to guard against police intimidation and to preserve an accurate record of what Brosius said to the CID agents.

The petitioner further maintains that the refusal to provide counsel was compounded by the deception of having Ewing in the room to create the impression that the CID had provided counsel by Ewing's presence.

In opposition, the respondent argues that Brosius was neither a suspect nor in custody when he made an ambiguous request for a lawyer in the orderly room. It was equally a request for his first sergeant, and in this sense was not a request for counsel at all since he would have been equally satisfied with his first sergeant. Thus, the CID was not obligated to provide him with an attorney. He next argues that Brosius never requested a lawyer when he was at the River Building because the sole support for this contention, Ewing's testimony, concerned the ambiguous request in the orderly room, not a second request at the River Building.

Additionally, as the military judge's findings of fact indicate, respondent contends that Brosius knew Ewing was not his lawyer and did not act as if he were. Ewing had identified himself as "working with the cops," and Brosius never treated him as his lawyer, for example, by consulting with him during the interview at the River Building.[7]

We reject the respondent's assertion that there was no second request for counsel. The military judge so found and we accept that finding. However, we do agree with him that this claim must fail because both requests for counsel were made in a noncustodial setting, as determined by the military courts after

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[7] The respondent also asserts that Brosius acknowledged that he knew Ewing was "the" prosecutor in the murder case. We reject this because the record shows that Brosius only knew that Ewing was a prosecutor, and not the prosecutor in the case.

full and fair consideration of the claim (and when the petitioner was not a suspect as well). Additionally, assuming *Miranda* applies here (which it does not), the first request was ambiguous, and thus could not be a valid request for counsel.

Miranda only applies to suspects in a custodial setting, so a request for counsel in a noncustodial setting does not obligate law enforcement officers to ensure counsel is present. *See United States v. Hayes,* 231 F.3d 663, 2000 WL 1672631, at *10 (9th Cir. 2000) (*Miranda* rights do not apply to a voluntary conversation with a cooperating witness); *Alexander v. Connecticut,* 917 F.2d 747, 751 (2d Cir. 1990) (Fifth Amendment right to counsel did not attach because defendant's admissions were made in a noncustodial setting). *See also United States v. Myers,* 123 F.3d 350, 359-60 (6th Cir. 1997). The petitioner's reliance on *Davis, supra,* and *Edwards, supra,* is misplaced because those cases dealt with suspects in custodial settings.

As the respondent also points out, the first request for counsel was ambiguous. Contrary to Brosius's position, the military judge found that the petitioner had asked for the presence either of a lawyer or his first sergeant, a finding not disturbed on appeal. This is an ambiguous request for counsel that triggers no Fifth Amendment rights. *See Davis, supra.*

We also think that the respondent's argument, that Brosius would have been satisfied with his first sergeant as well as with a lawyer, provides us with a correct interpretation of the Army Court of Military Review's analysis of this issue, although the respondent did not explicitly put it that way. The court spoke of Brosius's intent in seeking counsel, 37 M.J. at 660, but, in context, with an earlier reference on the same page to the request for counsel or the first sergeant, the conclusion was that Brosius was asking for someone, not necessarily a lawyer, to look out for his interests.

Based on the foregoing, we need not discuss the petitioner's argument on Ewing's conflict of interest, at least not in a Fifth

Amendment context. We also note here the military judge's factual findings that the petitioner knew that Ewing was not his lawyer and not working on his case or on his behalf.

E. *The Claim that Brosius Invoked His Right To Remain Silent.*

The petitioner also claims that the CID ignored the invocation of his right to remain silent. However, the record shows that he was willing to speak and cooperated with the investigators.

V. *Conclusion.*

We have considered the petitioner's remaining arguments, and although not specifically discussed, we find them without merit, including the claim that the military judge was biased and the claim that the military courts failed to make factual findings, based certain findings on speculation, and left open certain legal conclusions.

[The following Order was not published in the official reports, but was included at the end of the district court's memorandum.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL TODD BROSIOUS, Petitioner	:	
	:	
vs.	:	CIVIL ACTION NO. 1:CV-99-1387
WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA. Respondent	:	

ORDER

AND NOW, this 13th day of December, 2000, it is ordered that:

1. The petition for a writ of habeas corpus under 28 U.S.C. §2241 is denied.

2. The motion for oral argument or for a hearing is denied.

3. The Clerk of Court shall close this file.

/s/
William W. Caldwell
United States District Judge

37 M.J. 652

U.S. ARMY COURT OF MILITARY REVIEW.

UNITED STATES, Appellee,

v.

Specialist Michael T. BROSIUS, 198-54-5517, United States Army, Appellant.

ACMR 9002732.

10 May 1993.

Before CREAN, WERNER, and GONZALES, Appellate Military Judges.

OPINION OF THE COURT AND ACTION ON PETITION FOR NEW TRIAL

WERNER, Judge:

Though charged with premeditated murder, the appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (1982) [hereinafter UCMJ].[1] The court sentenced him to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority commuted the confinement portion of the sentence to seventy-five years and approved the remainder of the adjudged sentence.

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[1] He also pled guilty to communicating a threat to kill a commissioned officer in violation of Article 134, UCMJ, 10 U.S.C. § 934 (1982).

In this appeal, we address the following assignments of error:

I. The evidence is legally insufficient to establish the offense of unpremeditated murder.

II. The military judge erred in admitting an uncorroborated pretrial statement from the appellant to military criminal investigators in which he confessed to Tammy Ivon's murder.

III. The military judge erred in denying a defense motion to suppress certain incriminating pretrial statements in violation of his rights under the 5th and 14th Amendments.

IV. The military judge erred in failing to dismiss charges pursuant to Rule for Courts-Martial 707 [hereinafter R.C.M.] on grounds that the appellant had been held in arrest for more than ninety days.

This court also specified the question of whether the appellant's plea of guilty to wrongfully communicating a threat was provident.

Having considered the arguments and briefs of counsel for the parties, and having reviewed the entire record, we determine that none of the assigned errors have merit. Moreover, with regard to the specified issue, we find that the appellant's guilty plea was provident.

I. The Prosecution's Case

On the morning of 2 June 1990 at about 0440 hours, two sergeants walking near the parking lot adjacent to the enlisted servicemembers' barracks on Giebelstadt Kaserne, Germany, observed a pair of legs protruding from beneath a pickup truck. Upon investigating, they discovered that the legs belonged to Private First Class (PFC) Tammy Ivon who was seriously injured from numerous knife wounds inflicted upon her by an unknown assailant. One of the sergeants, First Sergeant (1SG) Gentry, observed that although she was breathing, PFC Ivon's

pulse was weak, she was moaning, her head twitched, and she appeared to be in shock. Her jeans were pulled down to her ankles.

First Sergeant Gentry asked two passersby for help in assisting PFC Ivon. One of them, PFC Sherard, crawled under the truck to render first aid. He observed that her pulse was faint, she moved her hands and opened her eyes. She appeared to have been bleeding extensively but the blood had dried on her body and clothing. Her shirt was torn and lay open. Her jeans, which were pulled down to her ankles, had been cut through at the pelvic area. Her undergarments appeared to have been cut from her body and lay under her. First Sergeant Gentry told PFC Sherard to get a blanket. As he arose, PFC Sherard noticed an individual staring at him from a road abutting the parking lot. The two stared at each other for ten to fifteen seconds before the individual quickly walked away into the treeline. At trial, PFC Sherard insisted that, although it was twilight, he saw the individual clearly enough to identify him as the appellant.[2]

At about 0507 hours, a medic who had arrived on the scene pulled PFC Ivon's body from beneath the truck and attempted to revive her. Although he felt a slight pulse, he observed that she had a sucking chest wound and was not breathing. Despite his resuscitative efforts, PFC Ivon did not regain consciousness and died from her wounds.

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[2] The appellant had moved to suppress PFC Sherard's in-court identification on the grounds that it was unreliable and that it was tainted by a suggestive pretrial lineup. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *United States v. Quick*, 3 M.J. 70 (C.M.A. 1977). The military judge correctly denied the motion as the evidence established that PFC Sherard had the opportunity and time to identify the appellant uninfluenced by the lineup. Moreover, meteorological data admitted during the trial proved that, at that time of the morning on the day in question, there would have been sufficient light to enable PFC Sherard to make the identification.

An autopsy conducted by a military pathologist, Doctor (Dr.) Marzouk, revealed that PFC Ivon died as a result of loss of blood from multiple stab wounds to her vital organs from a single-edged knife approximately three quarters of an inch wide and five inches long. The killer had stabbed her four times in the chest, five times in the abdomen, and had slashed her once in and around each eye. The autopsy report states, "The stab wounds did not lacerate the eye globes. The stab wound went lateral to the eye globe in the left eye, and above the eye globe in the right eye." From the angle of entry of the weapon, Dr. Marzouk concluded that PFC Ivon had been lying on her back when the fatal blows were administered. The wounds to her chest were administered through her shirt and tank top; four of the wounds to her abdomen occurred after her garments were displaced or removed. There were abrasions and contusions on her neck and chin as well as hemorrhaging behind the eyes which, Dr. Marzouk surmised, may have been caused by strangulation. There were contusions on her knees and on the exterior of her genitalia. However, there was no evidence of motile sperm in or on her body. The autopsy report also noted that PFC Ivon's brassiere, tank top, panties and jeans had been cut through the center of each garment. Toxicological examination established the presence of a significant amount of alcohol in her blood but no evidence of drug use.

Dr. Marzouk testified in accordance with the autopsy report. He added that there was grass on PFC Ivon's clothing and the back of her head. In response to a question from the court, he opined that PFC Ivon could have lived for a period of up to one to two hours after she had been stabbed.

Later in the morning of 2 June, members of the Criminal Investigation Command (CID) secured the crime scene and interviewed potential witnesses on Giebelstadt Kaserne concerning the circumstances surrounding PFC Ivon's death. At the crime scene, they discovered PFC Ivon's car parked adjacent to the truck under which her body was discovered. Blood stains permeated the rear seat of her vehicle and a piece

of her underpants was found on the floorboard. The CID also found a blood stain on the cab and camper-top of the truck. There was no forensic evidence to establish the identity of PFC Ivon's killer. Nor was the murder weapon found.

The CID first came into contact with the appellant when he approached them on 2 June with information about PFC Ivon's death. The appellant's roommate, Private (PVT) Casero, testified that he was awakened about 1110 hours by the appellant yelling, "Sparks did it." The appellant explained that he was referring to the death of PFC Ivon and that he believed that her boyfriend, PVT Sparks, was the perpetrator. The appellant also gave this information to his first sergeant who referred him to Special Agent (SA) Allen, the CID agent conducting the investigation at Giebelstadt. The appellant reported that PFC Ivon gave him a ride back to the barracks from an off-base dance club on the night she was killed and that a third person was in the car with them. The appellant refused to identify the third person until "his first sergeant or a lawyer or someone with his interests" was present to insure that the information was properly documented. Special Agent Allen, who was busy with other witnesses, instructed the appellant to make his report to investigators at the CID office in Wuerzburg.

The appellant complied with SA Allen's instructions. At the CID office, he was interviewed by SA Nash. In compliance with the appellant's request, Captain (CPT) Ewing, a judge advocate known by the appellant because he had given him legal advice on a civil law matter two years earlier, was present. The appellant knew that CPT Ewing was a prosecutor but did not object to him being present.

At about 2200 hours, 2 June, the appellant made a written statement in which he stated that he was a close friend of PFC Ivon and that he saw her on the evening of 1-2 June at the Rock Palace dance club in Wuerzburg. There, they chatted and danced together. At 0200 hours, 2 June, she gave him and another soldier a ride back to Giebelstadt Kaserne where they entered through the back gate and showed their identification

cards to the gate guard. He described the soldier in detail and noted that he sat in the rear of the vehicle behind PFC Ivon, said nothing, and just stared straight ahead the entire trip. After arriving at the barracks parking lot at about 0225 hours, he and the soldier went into their respective barracks while PFC Ivon remained in the vehicle because she did not want her boyfriend to see her with them.

The sign-in log for the back gate indicated that PFC Ivon's vehicle was driven onto Giebelstadt at 0230 hours and that there were only two persons in the vehicle. As a result of this discrepancy, the CID decided to reinterview the appellant as a suspect. On 4 June, after being warned of and waiving his rights under Article 31, UCMJ, and the Fifth Amendment, the appellant agreed to answer questions posed by SA Blackmon. Special Agent Blackmon testified that appellant reiterated his earlier version of the events of the evening of 1-2 June. However, when asked pointed questions, the appellant became physically agitated and persisted in giving vague answers. Special Agent Blackmon determined that further inquiry would be unproductive and terminated the interview.

On 5 June, the appellant was again interviewed by the CID, this time by SA Dumond. After again waiving his rights, he reluctantly but definitively confessed, in writing, to killing PFC Ivon. In this statement, the appellant restated that PFC Ivon gave him a ride back to the barracks from the Rock Palace, that they showed their identification cards to the gate guards and that they parked in the barracks parking lot. Then, in the key portion of his confession, the appellant stated that there was no third person in the vehicle. He then described the circumstances of the homicide:

> [S]he bent down to pick up her purse. And also the spiked wrist band, she had on the floor. And, in the process of her doing that, she touched my leg. We both then climbed out of the car and jumped in the back of the car. We started having sexual intercourse, making love. I realize it, wasn't right. So, I tried stopping her. I started stabbing her with the knife

in the chest and the stomach. She kept on looking at me, so I took the knife and went across her eyes, so she would stop looking at me. I got out of the car and went towards the barracks. I went through the side door, I couldn't get in to the first floor, so went to the second floor. When I went on the second floor, all the lights were out. Thats when I saw SPC Heeter. He was drunk walking down the hallway. He ask who I was. So, I gave him my name. He said he was drunk, and I said, at least you are doing better then me, I'm sober. Then I went from there down the other steps pass the C.Q. desk. I went to my room and took off my clothes and went to bed.

In response to specific questions posed by SA Dumond, the appellant admitted that he killed PFC Ivon because "she's like a sister to me. It's not right having sexual intercourse. Its like incest." He claimed not to remember what kind of knife he used or whether he cut PFC Ivon's clothing. He believed that he stabbed her about nine times but could not particularize the number of times he stabbed her in the chest and stomach. In concluding, the appellant stated, "I don't believe I did it and if I did I want help. I feel like I falsified the whole statement."

Several witnesses testified to having seen the appellant behaving oddly on the morning of PFC Ivon's death. Private Casero testified that he believed the appellant had not returned to his room that evening. He noted that the appellant's bed was made when he was awakened by the appellant at about 1110 hours. However, beds were not required to be made on weekends. He also observed that there was a pile of laundry nearby.

At 0725 hours, Specialist (SPC) Joseph was walking to his post as a guard when he saw the appellant coming towards him from the direction of the bowling alley and recreation center. However, both facilities were usually closed at that hour. The appellant appeared shocked and dazed and mumbled a greeting to him.

At 0730 hours, PFC Reckers, the unit armorer who had just issued SPC Joseph his weapon, was taking a smoke break outside the barracks when she saw the appellant come out of the treeline and enter the building. He said that he had been to the gym to work out. Private First Class Reckers had worked at the gym and knew it was closed at that time.

At about 0730-0800 hours, SPC Bajorek saw the appellant putting two tires into a dumpster. He seemed angry and upset and had a strange look in his eyes. He said that the girl who had given him a ride home two hours earlier was dead. He suspected her boyfriend, PVT Sparks, had killed her and the appellant threatened to kill him.

At about 0830 hours, PFC Risinger encountered the appellant at the barrack's snack machine and asked him if he had heard about PFC Ivon's death. The appellant said he had not. When PFC Risinger told him she had been stabbed, he replied, "You're kidding." At 1000 hours, PFC Risinger saw the appellant with his laundry bag. The appellant said he was going to the laundromat.

At 1100 hours, at the laundromat, the appellant told PFC Reckers that PFC Ivon gave him a ride home the previous evening and that he might have been the last person to see her alive. He said he had heard she was stabbed eleven times.

Specialist Tyner testified that as he passed PFC Ivon's car at about 0300 hours, he heard a "grunt or a groan or someone moving" in the car. The windows of the vehicle were fogged and he could not identify the individuals in it. However, he thought they were having sex.[3]

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[3] Specialist Freeman, testifying for the defense, stated that, at about 0230-0240 hours, as he returned to the barracks, he observed two individuals in a parked car and it appeared they were having sex.

II. The Defense's Case

The defense attempted to demonstrate that, notwithstanding his confession, the appellant was not the perpetrator. It presented evidence tending to indicate that another individual committed the crime. It also attacked the appellant's confession as uncorroborated and involuntary.

Special Agent Robinson testified that the appellant's confession of 5 June was incomplete or erroneous as to certain particulars. The appellant purportedly said that he cut PFC Ivon's mouth and cheek. He also said that he used a double-edged, olive drab knife.

Specialist Heeter testified that he saw the appellant on the second floor of the barracks around the time that PFC Ivon was killed. Although he had been drinking, he did not notice any blood on the appellant.

Private First Class Edge testified that she saw the appellant in the laundromat at about 1100 hours on 2 June. He told her about PFC Ivon's death and said that there had been a third person in the car with them when they returned to the barracks that morning. He described the individual as big, blond and wore glasses. However, during cross-examination, PFC Edge said that the appellant related certain particulars of the crime that indicated he had detailed knowledge of the crime scene. For example, he stated that PFC Ivon's legs were sticking out from beneath the pickup truck; she had been stabbed in the chest and stomach nine times; her jeans had been cut and were pulled down around her boots; and, there was blood on the side of the truck. Private First Class Edge did not ask how he had obtained this information.

Several defense witnesses suggested PVT Sparks may have had a motive to kill PFC Ivon. They testified that he was a jealous boyfriend and threatened to kill her if she dated other men. His roommate testified he owned a hunting knife. After his arrest, PVT Sparks told his roommate that PFC Ivon had

been stabbed eleven times. Other witnesses suggested there was another unidentified individual who may have been the perpetrator. After PFC Ivon's body was discovered, a medic saw a strange man pacing back and forth in the parking lot. Later he saw the individual in the mess hall staring into space. Another witness saw a white man in cowboy boots and jeans walking near the barracks at about the time PFC Ivon was killed.

The appellant's mother testified that he had called her in the United States the evening of 2 June. He told her about PFC Ivon's death and related that she had given him and a third person a ride back to the barracks. He described the individual as he did for SA Nash, silent and staring straight ahead. Later that week he told his mother that CID "had his mind so messed up, that at a point he almost believed he did commit the crime." He said he signed a statement but that it was false.

Private First Class Risinger was recalled and testified that PFC Sherard told him he could not identify the individual he saw staring at him near the barracks parking lot.

III. Sufficiency of the Evidence

The appellant has styled his challenge to the sufficiency of the evidence in terms of legal sufficiency. The text of his argument, however, also raises the issue of factual sufficiency.

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the government, the trier of fact could rationally find the existence of every element of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court is itself convinced of appellant's guilt beyond a reasonable doubt. UCMJ art. 66(c); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

We are satisfied of the legal and factual sufficiency of the evidence in this case. The government's case rested primarily on three evidentiary pillars: (1) the objective evidence establishing that PFC Ivon was stabbed to death sometime between 0230 and 0440 hours, 2 June 1990, in her automobile parked near the appellant's barracks and that the appellant had been with her at about the time of her death; (2) the observations of witnesses that the appellant was in the vicinity of the parking lot on the morning of 2 June, was behaving oddly at that time, and had knowledge of intimate details of the crime; and (3) the appellant's confession to the CID including his strange behavior during his confrontations with them.

In opposition, the defense pointed out that there was no forensic evidence—blood, hair, semen, fingernail marks, bruises—linking the appellant to the crime. Moreover, there was testimony from a witness, SPC Heeter, who saw the appellant in the barracks at about the time PFC Ivon was killed and that the appellant had no blood on him. Specialist Heeter was, however, intoxicated at the time and his perception may have been impaired (in his statement of 5 June, the appellant indicated that the hall lights were out). There was evidence that the appellant was peaceable and a close friend of the victim. The defense's evidence also raised the possibility that another individual was the killer. Finally, the appellant asserted that his confession was haltingly made and ambiguous.

Despite the evidentiary conflict, the court members found that the evidence as a whole established the appellant's guilt beyond a reasonable doubt. We see no reason to alter that finding. The appellant's confession and the circumstances under which it was made contradict his assertion of innocence notwithstanding its ambiguity as to certain particulars. Moreover, there were other factors that tended to establish the appellant's guilt. These include: (1) his statement that a third person was in the vehicle when he and PFC Ivon arrived at the Kaserne was contradicted by the vehicle log maintained at the back gate indicating only two persons were in the vehicle; (2)

his knowledge of the number of wounds on PFC Ivon and the manner in which her clothing was cut; and, (3) his knowledge of details about the crime scene, such as her legs protruding from beneath the truck and the blood on the truck. Accordingly, we reject this assignment of error.

IV. Corroboration of the Confession

The appellant moved to suppress his confession of 5 June on grounds that it was not corroborated. Military Rule of Evidence 304(g) [hereinafter Mil. R. Evid.] provides in material part:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. . . .

In a recent decision involving the corroboration requirement of Mil. R. Evid. 304(g), the Court of Military Appeals held:

> We have consistently held that it does not require independent evidence of the "*corpus delicti*" of the confessed offense (*see* 7 J. Wigmore, *Evidence* § 2072 (Chadbourn rev. 1978) for a discussion of that term) but, instead, that it requires independent evidence which establishes the trustworthiness of the confession. *United States v. Rounds,* 30 M.J. 76, 80-81 (C.M.A.), *cert. denied,* [498] U.S. [846] (1990); *United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988); *United States v. Yeoman,* [25 M.J. 1 (C.M.A. 1987)]. These holdings are consistent with

> Supreme Court precedent and with practice in Federal civilian courts such that it can be realistically said in the Federal sector that the "corpus delicti" corroboration rule no longer exists. The bottom line is that the corroborating evidence must raise only an inference of truth as to "the essential facts admitted" in the confession. (citations and footnote omitted).

United States v. Maio, 34 M.J. 215, 218 (C.M.A.), *cert. denied*, 506 U.S. 868 (1992).

The Court has also held, "Although no mathematical formula exists to measure sufficient corroboration, our review of the federal court decisions cited below leads us to conclude that the amount of corroboration generally needed is not great." *United States v. Melvin*, 26 M.J. at 146. On the basis of the foregoing criteria, we hold that the appellant's confession was sufficiently corroborated by independent evidence to establish its trustworthiness.

First, the objective evidence in the autopsy report confirmed the number and type of wounds the appellant admitted to having administered to PFC Ivon. He admitted that he stabbed her about nine times with a knife and that he "went across her eyes" so she would not look at him; the autopsy report was consistent with those admissions. The appellant admitted to having sexual intercourse with PFC Ivon; the autopsy report indicated her genital area was bruised. Moreover, two passersby testified that they thought two individuals were having sex in PFC Ivon's car at the approximate time of her death. Second, SPC Heeter corroborated the appellant's admission to having seen him in the barracks after stabbing PFC Ivon. Third, the testimony from several witnesses that the appellant said he had been to the gym and laundromat dovetailed with portions of the confession. Collectively, this independent evidence establishes that this assigned error is without merit.

V. Admissibility of the Appellant's Pretrial Statements

The appellant contends that his pretrial statements to the CID on 2, 4, and 5 June should have been suppressed as they were obtained in violation of his right to the presence of legal counsel during their initial and subsequent custodial interrogations. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966).[4] We disagree.

It is undisputed that the appellant was advised of and waived his rights during the interrogations of 4 and 5 June. The CID agents conducting those interrogations, SA Blackmon and SA Dumond, testified that they suspected the appellant of killing PFC Ivon, gave him the requisite warnings, and obtained the appellant's consent to be interviewed and make a statement without counsel present. However, the appellant argues that those interrogations were tainted by the violation of his right to counsel by SA Allen and SA Nash during his meetings with them on 2 June. He maintains they should have reasonably considered him a suspect when he approached both agents with information about PFC Ivon's killing because he was emotionally upset and agitated, and they should have immediately advised him of his right to counsel. Furthermore, when he requested that his first sergeant or a lawyer be present to witness his statement, the agents should have obtained legal representation for him instead of bringing in a prosecutor.

Unfortunately for the appellant, the evidence does not support his characterization of the events of 2 June. The appellant was neither in custody nor reasonably suspected of killing PFC Ivon by the CID agents with whom he spoke on that date. The CID agents testified that the appellant voluntarily appeared before them as a friend of PFC Ivon wishing to provide them with information that might lead to the apprehension of her killer. The fact that he was distraught or

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[4] *See also United States v. Harris*, 19 M.J. 331 (C.M.A. 1985); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

grief-stricken would not lead a reasonable criminal investigator to have suspected him of an offense since that is not suspicious behavior from a friend of a crime victim.

Moreover, the appellant's request that a lawyer be present while he spoke with the CID did not, under the circumstances, constitute a request for legal counsel even assuming there was a custodial interrogation. Invocation of the right to counsel must be unequivocal and unambiguous. *United States v. Schake*, 30 M.J. 314, 317 (C.M.A. 1990); *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992), *pet. granted*, --- M.J. ---- (C.M.A. 1993). While the appellant said that his purpose for requesting that CPT Ewing be present was to look out for "his interests," in context, he was referring to something other than his potential culpability for the killing. We therefore reject this assigned error as unmeritorious.

VI. Speedy Trial

The appellant contends that he was improperly held in arrest for a period in excess of ninety days and that his motion to dismiss the charges for lack of speedy trial pursuant to Rule for Courts-Martial 707(d) and (e) should have been granted.[5] We

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[5] At the time of the appellant's trial, R.C.M. 707(d) and (e) provided, in part:

> (d) *Arrest or confinement.* When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement in excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.
>
> (e) *Remedy.* Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

Rule for Courts-Martial 707(d) and (e) was subsequently changed by

agree with the military judge that the appellant was not denied a speedy trial.

The chronology surrounding the appellant's arrest and pretrial restraint was set forth in a stipulation of fact. The parties agreed that, after he confessed to killing PFC Ivon, the appellant was placed in a military police detention cell on 6 June. On 7 June, he was released to his unit where he was housed in the unit fire direction center (FDC) on Giebelstadt Kaserne for two days.[6] From 9 June to 12 June, the appellant received a psychiatric evaluation at a military hospital in Frankfurt. On 12-13 June, he was returned to the FDC on Giebelstadt before being relocated to the Initial Readiness Position (IRP) at Larson Barracks in Kitzingen, fifteen kilometers from Giebelstadt, where he remained until 21 July.[7] On that date, the charges were preferred and the accused was ordered into pretrial confinement. Eighty days later, on 9 October, the initial session of the court-martial was held. The total time the appellant spent in pretrial restraint was one hundred and twenty-five days.

After a hearing, the military judge found that twenty-eight days of the period in which the appellant was restrained was excludable from governmental accountability pursuant to R.C.M. 707(c). He excluded twenty-seven days during which the appellant underwent mental evaluation under R.C.M. 707(c)(1)(A) and hospitalization as a suicide risk, and one day when there was no restraint.

Executive Order No. 12767, dated 27 June 1991, and incorporated as part of Change 5 to the Manual for Courts-Martial.

[6] The FDC was described as a small military compound, forty yards square, with limited recreational facilities, surrounded by barbed wire.

[7] The IRP was described as a "fenced in site . . . approximately three city blocks wide . . . with concertina on top, all the way around. . . ." There was a barracks on the site that housed ninety-five soldiers.

The judge also determined that the thirty-three days during which the appellant was restricted to the IRP did not constitute restriction tantamount to arrest as the conditions of the appellant's restraint were not sufficiently onerous to support that determination. The evidence supporting the judge's ruling established that, the appellant was required to perform all military duties; was not deprived of personal items; was granted access to recreational facilities outside the IRP; and was assigned a separate room in a barracks on the IRP. The judge noted that the appellant could not leave the IRP unless he had an escort, that he was not allowed to wear civilian clothing and that his pass privileges were revoked for brief periods. However, on balance, these factors did not weigh as heavily in the judge's decision.

In determining whether pretrial restriction constitutes pretrial arrest or confinement, this court has declined to articulate a "bright line" test. Instead, it looks at the totality of the circumstances surrounding the restraint. "As the terms of a pretrial restriction become increasingly onerous, the nature of the accused's pretrial restraint moves further along the spectrum between restriction and confinement, until it finally becomes restriction tantamount to confinement." (footnote omitted). *United States v. Gregory*, 21 M.J. 952, 955 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986). We find, as did the military judge, that the appellant's pretrial restraint was not so onerous as to exceed the level normally representative of restriction. While restriction is a form of restraint which entitles an accused, upon conviction, to administrative credit, *see United States v. Russell*, 30 M.J. 977 (A.C.M.R. 1990), or to dismissal of charges for a delay in excess of one hundred and twenty days, *see* R.C.M. 707(a), it does not justify dismissing charges for delays over ninety days. Accordingly, as the amount of time spent in pretrial arrest or confinement did not exceed ninety days, the appellant's motion to dismiss was properly denied.

VII. Specified Issue

The question posed by the specified issue is whether the appellant's plea of guilty to wrongfully communicating a threat to kill a company commander, CPT Logan, on 12 May 1990 was improvidently entered when the appellant stated during the providence inquiry that he was intoxicated at the time he made the threat. We answer that question in the negative.

The appellant informed the military judge that he and some friends had been drinking alcoholic beverages late into the night when they began discussing the fact that one of their friends had been convicted for trafficking in narcotics. Angered at his friend's commanding officer for initiating disciplinary action, the appellant called the charge-of-quarters (CQ) and, in his drunken state, informed him of his intention to kill CPT Logan. The appellant admitted that he was "serious" in making the threat.

Two principles of military law militate against rejecting the appellant's plea. First, a plea of guilty need not be set aside because the information elicited at trial raises only a possibility that a defense to the charge may exist. *United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973). Rather, there must be a substantial basis for the defense. *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). Second, voluntary intoxication is not a defense to a general intent crime since the unlawful act itself is presumptive of the accused's *mens rea*. R.C.M. 916(l)(2). Wrongful communication of a threat is such a general intent crime and an accused's voluntary intoxication would not furnish him with an excuse for his misconduct. *United States v. Humphrys*, 7 U.S.C.M.A. 306, 22 C.M.R. 96 (1956). We note that voluntary intoxication could vitiate a guilty plea if it implicated a substantial basis for showing "that the declaration was made in jest or for some other innocent and legitimate purpose." *Id.* at 307, 97. However, the appellant's responses during the providence inquiry clearly negate that possibility.

VIII. Petition for New Trial

The appellant also asserts that he should be granted a new trial on the basis of newly-discovered evidence. UCMJ art. 73; R.C.M. 1210(f)(2). In support, he has filed and we have admitted numerous appellate exhibits in support of his argument that someone other than the appellant may have killed PFC Ivon. Having examined these exhibits and considered the appellant's arguments, we deny his petition.

For a petition for a new trial to lie, the appellant has the burden of demonstrating that the "new evidence" was discovered after conclusion of the trial, that it was not discoverable through due diligence at the time of trial, and that it "would probably produce a substantially more favorable result for the accused." *Id.* We perceive nothing in the appellant's exhibits to lead us to conclude that the matters contained therein would enable the appellant to meet any portion of the tri-part test.

We have considered the remaining assignments of error to include those personally submitted by the appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

Accordingly, the findings of guilty and the sentence are affirmed. The appellant's Petition for a New Trial is denied.

Senior Judge CREAN and Judge GONZALES concur.

39 M.J. 378

UNITED STATES COURT OF MILITARY APPEALS

Daily Journal

Wednesday, January 26, 1994

94-75

APPEALS—SUMMARY DISPOSITIONS

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No. 93-1421/AR. U.S. v. Michael T. Brosius. CMR 9002732. On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it is ordered that the petition for review is hereby granted; and that the decision of the United States Army Court of Military Review is affirmed. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

ORDERS GRANTING PETITION FOR REVIEW

***

No. 93-1421/AR. U.S. v. Michael T. Brosius. CMR 9002732. [See also APPEALS—SUMMARY DISPOSITIONS this date.]

Supreme Court, U.S.
FILED
JUN 27 2002

(2)

No. 01-1588

In the Supreme Court of the United States

MICHAEL TODD BROSIUS, PETITIONER

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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23 pages

QUESTIONS PRESENTED

1. Whether petitioner, who was convicted after court-martial proceedings, is entitled to *de novo* review of his challenges to his convictions in federal habeas corpus proceedings.

2. Whether petitioner was subjected to interrogation in violation of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and Article 31(b) of the Uniform Code of Military Justice, 10 U.S.C. 831(b).

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In the Supreme Court of the United States

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MICHAEL TODD BROSIUS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 278 F.3d 239. The opinion of the district court (Pet. App. 18a-45a) is reported at 125 F. Supp. 2d 681. The order of the Court of Military Appeals, now the Court of Appeals for the Armed Forces (Pet. App. 65a), is reported at 39 M.J. 378. The opinion of the Army Court of Military Review, now the Army Court of Criminal Appeals (Pet. App. 46a-64a), is reported at 37 M.J. 652.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2002. The petition for a writ of certiorari was filed on April 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following trial by a general court-martial, petitioner was convicted of unpremeditated murder, in violation of 10 U.S.C. 918 (Art. 118 of the Uniform Code of Military Justice (UCMJ)). In addition, pursuant to his plea of guilty, petitioner was convicted of communicating a threat to kill a commissioned officer, in violation of 10 U.S.C. 934 (Art. 134, UCMJ). As approved by the convening authority, his sentence included confinement for 75 years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Army Court of Military Review and the Court of Military Appeals affirmed. Pet. App. 64a, 65a. Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. That court denied the motion, *id.* at 45a, and the Third Circuit affirmed, *id.* at 17a.

1. a. On the early morning of June 2, 1990, two sergeants walking near the parking lot adjacent to an enlisted barracks on Giebelstadt Kaserne, in Germany, found Private First Class (PFC) Tammy Ivon, who was seriously injured as the result of numerous knife wounds. Her legs were protruding from beneath a pickup truck. One of the sergeants asked PFC Sherad, who was passing by, to assist them in rendering aid to PFC Ivon. When Sherad crawled under the vehicle, he noticed that Ivon had been bleeding extensively. As he arose, he observed an individual, whom he subsequently identified as petitioner, staring at him from an adjacent road. Ivon died of her wounds a short time later. An autopsy revealed that she had been stabbed four times in the chest, five times in the abdomen, and one time near each eye. Army Criminal Investigation

Division (CID) investigators located her automobile near where she was found. The back seat of her car was covered with blood and a portion of her underpants was on the floorboards. Pet. App. 2a, 47a-50a.

Evidence presented during a pretrial suppression hearing showed that, as the investigation developed on the day of the murder, June 2, 1990, CID investigators initially focused their attention on two suspects, PFC David Sparks, Ivon's boyfriend, and Specialist Randy Hestekin, Sparks's roommate. Hestekin had returned to the base early that morning with blood on his shirt and had instructed another soldier who observed him not to reveal what he had seen. Investigator Douglas M. Allen took Sparks to the hospital for a sexual assault determination. Pet. App. 20a.

During the late morning of June 2, petitioner awakened his roommate by screaming that Sparks had killed Ivon. Petitioner then repeated this accusation to his company First Sergeant, but he acknowledged that he had been with PFC Ivon on the night of the murder. The First Sergeant subsequently asked Agent Allen whether the investigators wished to speak with petitioner. Allen replied, "Yes, if he's in the area you can send him down." After the First Sergeant summoned petitioner to meet with Allen, petitioner informed Allen and another agent that PFC Ivon had driven him and another soldier, whom he did not wish to identify, back to the base from a local club the previous night. According to Agent Allen, petitioner then requested the presence of a lawyer, his First Sergeant, or some other third party to witness his statements. Allen responded that lawyers were available at CID Headquarters, known as "the River Building," and that petitioner should go there if he wanted to speak with a lawyer or someone else. Petitioner's section sergeant

then drove him to the River Building. Pet. App. 3a, 20a-21a, 50a.

At the River Building, Agent Mark Nash questioned petitioner without advising him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or under Article 31(b) of the Uniform Code of Military Justice, 10 U.S.C. 831(b).[1] Before beginning the interview, Agent Nash informed petitioner that Sparks was the main suspect and that, if petitioner was concerned about his rights or began to say anything potentially incriminating, the agents would stop questioning him and advise him of his rights. Nash added that Captain Harper Ewing, a military attorney who was the prosecutor assigned to the case, would be available to witness the interview. "When Captain Ewing arrived, [petitioner] recognized him as [the] attorney who had represented him in an earlier civil matter." Ewing made some preliminary inquiries to ascertain whether that representation would prevent him from prosecuting the case. Although Ewing told petitioner that he now was "working with the cops," petitioner voiced no objection to Ewing's presence and did not ask Ewing questions or seek his legal advice. Pet. App. 3a-4a.

Following his interviews, at approximately 10 p.m. on June 2, petitioner signed a statement acknowledging that PFC Ivon had given him and another male soldier a ride back to the base from a club and that he last saw her at approximately 2:55 a.m. that morning. He also

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[1] The obligation to provide *Miranda* warnings applies to custodial interrogations. Article 31(b) applies in broader circumstances, requiring that any person suspected of an offense and subject to the UCMJ be advised that he need not make a statement and that any statement may be used against him in a trial by court-martial. See 10 U.S.C. 831(b).

stated that Ivon had a troubled relationship with Sparks. Following the interview, petitioner returned to his unit. Before he left, the investigators took petitioner's clothing because it was the same clothing he had worn to the club the previous evening. Pet. App. 4a, 24a, 50a-51a.

According to Agent Nash, petitioner became a suspect the next morning, June 3, when CID investigators met about the case and realized that, although petitioner had stated that there were three persons in Ivon's car when it returned to the base in the early morning of June 2, the gate guard logs reflected that only two persons were in the vehicle. Nash testified in the suppression hearing that he knew of the discrepancy when he interviewed petitioner on June 2 but assumed that the gate guard had made a mistake. Since then, other evidence had come to light that implicated petitioner, and Hestekin's alibis had been verified. Pet. App. 24a-25a.

Petitioner returned for further questioning on June 4 and 5. On both days, he was advised of his rights under *Miranda* and Article 31, UCMJ, 10 U.S.C. 831, but waived his rights and agreed to answer questions. On June 4, petitioner reiterated his earlier version of events. On the following day, however, he admitted that he had killed PFC Ivon and retracted his earlier statement that there was a third person in her car when they returned to the base. Petitioner stated that he had sexual intercourse with Ivon in the back seat of her car upon returning to the base but attempted to stop because she was "like a sister" to him. He further stated that, when Ivon failed to terminate their encounter, he stabbed her approximately nine times in the chest and stomach and also stabbed her across the eyes

so she would stop looking at him. Pet. App. 4a-5a, 51a-52a.

b. Before trial, petitioner moved to suppress his statements to the investigators. He argued that the statements made on June 2 were inadmissible because they were not preceded by warnings under *Miranda* and Article 31, UCMJ, and were taken after he had requested the presence of counsel, and that the statements made on June 4 and 5 were tainted by the denial of his rights on June 2.

The military judge denied the motion. The judge found that petitioner was not entitled to warnings under Article 31, UCMJ, because the interviewing agents neither believed nor reasonably should have believed that petitioner was a suspect when he was interviewed on June 2. The judge also determined that petitioner's request for a lawyer was not for the purpose of obtaining legal representation or advice but was a request for an impartial observer. The judge made a factual finding that petitioner understood that Captain Ewing was not his lawyer, rejecting petitioner's contention that he was led to believe that Captain Ewing was his attorney. Pet. App. 27a-29a.

2. a. The Army Court of Military Review, which is authorized to make findings of fact as well as rulings of law, see 10 U.S.C. 866(c), affirmed petitioner's convictions. Pet. App. 46a-64a. The court rejected petitioner's argument that his statements on June 2 were taken in violation of his rights, finding that he "was neither in custody nor reasonably suspected of killing PFC Ivon by the CID agents with whom he spoke on that date." *Id.* at 59a. The court determined that petitioner had voluntarily made the statements in order to assist the investigation, and that his nervous demeanor was understandable because he was a friend of the

victim and thus would have raised no suspicions in a reasonable investigator. *Id.* at 59a-60a. The court added that, even if petitioner had been in custody, his request for counsel was not unequivocal. *Id.* at 60.

b. The Court of Military Appeals affirmed without issuing an opinion. Pet. App. 65a.

3. Petitioner subsequently filed a petition for habeas relief under 28 U.S.C. 2241. Addressing the standard of review, the district court observed that, under *Burns* v. *Wilson*, 346 U.S. 137 (1953), "a civilian court may only review decisions of military courts to determine if the latter gave the petitioner's claims full and fair consideration." Pet. App. 31a. Noting that the test had been "channeled somewhat" by a four-factor analysis adopted in *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976), the district court stated that it would "not disturb the military courts' underlying findings of narrative or historical facts" but would "review certain mixed questions of law and fact, such as whether petitioner was in custody." Pet. App. 33a.

The court first rejected petitioner's claim that he was a suspect when questioned on June 2 and therefore was entitled to warnings under Article 31, UCMJ. The court explained that Agent Allen was not yet aware of the discrepancy between petitioner's statement and the gate guard's logs on whether a third person accompanied petitioner and PFC Ivon back to the base, and that Agent Nash believed the gate guard had made a mistake. Also, the court observed, two valid suspects were already in custody, and Allen met petitioner while interviewing a number of soldiers. At that time, Allen anticipated that petitioner would supply incriminating evidence against Sparks. As for petitioner's reliance on the seizure of his clothing at the end of the interview,

the court determined that the argument had been given full and fair consideration by the Court of Military Appeals and did not alone constitute a basis for disturbing the conviction. Pet. App. 36a-37a.

The district court also rejected petitioner's contention that he was "in custody" for *Miranda* purposes when questioned on June 2. The court noted that petitioner was cooperative with the investigators at all times and never asked to leave. Moreover, the court observed, the Army Court of Military Review had made a factual finding that petitioner appeared before the agents voluntarily as a friend of PFC Ivon to assist in apprehending her killer. Pet. App. 40a-41a.

Finally, the court rejected petitioner's claim that he was denied his right to counsel in violation of *Miranda*. The court found that petitioner's initial request for counsel was ambiguous, and explained that petitioner was not entitled to *Miranda* warnings in any event because he was not in custody when he requested counsel. Pet. App. 42a-43a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court observed that, in *Burns*, this Court "applied a deferential standard of review to the claims that, on the undisputed facts, the habeas petitioners' constitutional rights were violated." *Id.* at 8a. Without attempting a complete elucidation of *Burns*, the court concluded that, "at least absent a challenge to the constitutionality of the statute under which the defendant was convicted, * * * our inquiry in a military habeas case may not go further than our inquiry in a state habeas case." *Id.* at 9a. Thus, the court assumed, "but solely for the sake of argument," that it could "review determinations made by the military courts in this case as if they were determinations made by state courts." *Ibid.* (emphasis omitted). Applying that

assumption, the court looked to the habeas standards set forth in 28 U.S.C. 2254(d), which, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, § 104, 110 Stat. 1218-1219, condition habeas relief on a showing that the prior adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented."

The court first addressed petitioner's claim that he should have been given *Miranda* warnings when interviewed on June 2. After reviewing petitioner's testimony and the testimony of the agents in the suppression hearing, the court found "no basis for overturning the Army Court of Military Review's determination that [petitioner] appeared before the CID agents voluntarily." Pet. App. 11a. As a result, the court determined, petitioner was not in custody when he gave his statements on June 2.

The court next addressed petitioner's claim that he was a suspect on June 2 and so was entitled to warnings under Article 31, UCMJ. The court found it unnecessary to determine whether petitioner was a suspect, concluding that any failure to suppress petitioner's statements on June 2 was harmless error because those statements added nothing to the statements he subsequently gave on June 4 and 5. Under *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the court explained, the subsequent confessions were admissible because they were preceded by *Miranda* warnings, which "suffice[d] to remove the conditions that precluded admission of the earlier statement." Pet. App. 16a (quoting *Elstad*, 470 U.S. at 314).

Finally, the court rejected petitioner's contention that, under *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the investigators should have suspended their questioning when petitioner requested counsel. The court explained that petitioner could not rely on *Edwards* because he was not in custody when he requested counsel. Pet. App. 17a.

ARGUMENT

Petitioner contends (Pet. 10-19) that the courts of appeals disagree on the standard of review that governs habeas claims arising out of court-martial proceedings. According to petitioner, the court below should have followed other courts of appeals by applying a *de novo* standard of review to his claims. That contention lacks merit and does not warrant review.

1. In *Burns* v. *Wilson*, 346 U.S. 137 (1953), this Court addressed the scope of federal habeas review of military court-martial proceedings. Four Justices stated in a plurality opinion that,

> "[i]n military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings —of the fair determinations of the military tribunals after all military remedies have been exhausted."

Id. at 142. Accordingly, the plurality explained, "when a military decision has dealt fully and fairly with an allegation raised in [an] application [for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Ibid.* Instead, it "is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." *Id.* at 144. The petitioners

therefore could not attempt "to prove *de novo* * * * precisely the case which they failed to prove in the military courts." *Id.* at 146. Justice Minton concurred in the judgment because, in his view, the proper role of a federal habeas court in reviewing a court-martial conviction was limited to determining whether the court-martial possessed jurisdiction. *Id.* at 147.

While *Burns* has not produced a completely clear standard, see Pet. App. 7a-8a, there is no conflict over the application of *Burns* that warrants this Court's review in this case. As the court of appeals observed (*id.* at 7a), habeas review of court-martial convictions is most often conducted by the Tenth Circuit because the United States Disciplinary Barracks is located in Fort Leavenworth, Kansas. That court reads *Burns* to permit habeas review of a military conviction only if, *inter alia*, the claim involves a substantial constitutional question and raises an issue of law rather than fact, and the "military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards." *Lips* v. *Commandant*, 997 F.2d 808, 811 (10th Cir. 1993), cert. denied, 510 U.S. 1091 (1994); see *Calley* v. *Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975) (en banc) (adopting same standards), cert. denied, 425 U.S. 911 (1976). Petitioner could not prevail under that approach, because he does not argue that the military courts "failed to apply proper legal standards" or "failed to give adequate consideration" to his claims. Instead, he seeks *de novo* review of the military courts' application of settled legal standards to the facts of this case. Pet. 17-18. Accordingly, the district court properly determined that petitioner was not entitled to relief under the Tenth Circuit's approach. Pet. App. 32a-33a.

Petitioner asserts (Pet. 11-12) that three courts of appeals have adopted a *de novo* standard when addressing habeas challenges to court-martial convictions. The decisions of two of the three courts of appeals did not involve a habeas petition, however, but instead arose in the context of civil proceedings seeking back pay, reinstatement, and other comparable relief from sentences imposed by courts-martial. See *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.) (federal question and mandamus claim seeking back pay, honorable discharge, and lost benefits), cert. denied, 454 U.S. 864 (1981); *Sisson* v. *United States*, 814 F.2d 634 (Fed. Cir.) (Tucker Act claim seeking repayment of forfeited compensation), cert. denied, 484 U.S. 846 (1987). Neither decision purports to adopt or has been construed by those courts as establishing a *de novo* standard for habeas actions.[2]

The third decision relied on by petitioner, *Allen* v. *VanCantfort*, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971), held that, "[w]ith respect to constitutional issues, the scope of review in habeas corpus challenges to military convictions is more limited than in comparable civilian cases." *Id.* at 629. The court's subsequent observation that it would "review briefly petitioner's claims on the merits," *id.* at 630, does not establish precedent for a *de novo* standard, and should not be so interpreted in light of *Burns*' rejection of such a standard for review of claims, similar to those here, that confessions had been coerced. 346 U.S. at 145-146

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[2] In *Hatheway*, the court could not assess whether the "constitutional arguments received full and fair consideration" in the military courts "because none of the military courts articulated its analysis of them." 641 F.2d at 1380 n.4.

(plurality opinion); *id.* at 147 (Minton, J., concurring). See also Pet. App. 8a.

Petitioner also observes (Pet. 10-11, 13) that, while two courts of appeals apply the same standards of review to habeas challenges to court-martial proceedings and habeas challenges to state court proceedings, those courts, unlike the court below, have not applied post-AEDPA habeas standards in the military context. See Pet. 10 (citing *DeChamplain* v. *Lovelace*, 510 F.2d 419 (8th Cir. 1975), and *Kauffman* v. *Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970)). There is no conflict on the question, however, because those cases were decided before enactment of the AEDPA, and those courts have not considered the issue since the AEDPA's enactment. Moreover, the court of appeals here did not definitively decide that the AEDPA standards apply to habeas review of military convictions, but simply held that no more favorable standards should apply in that context than the standards that apply to habeas review of state court convictions. Pet. App. 9a. Petitioner offers no convincing basis for concluding that habeas review of court-martial convictions should be less deferential than habeas review of state court convictions, and he therefore provides no theory under which he might be entitled to more favorable collateral review than he received in this case.[3]

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[3] Petitioner suggests (Pet. 17-19) that *de novo* review is appropriate because civilian courts are competent to protect military members' legal rights. But petitioner overlooks that military defendants have recourse to the Court of Appeals for the Armed Forces, whose judges are civilians, see *Weiss* v. *United States*, 510 U.S. 163, 169 (1994), with certiorari review available in this Court, 28 U.S.C. 1259. After the completion of that review, finality considerations that are fundamental to habeas review argue strongly

2. In any event, even if, as petitioner maintains (Pet. 17-19), a *de novo* standard of review should be applied to his claims, petitioner still would not be entitled to relief.

a. Petitioner contends (Pet. 21-24) that he was "suspected of an offense" under Article 31(b), UCMJ, when questioned on June 2, and therefore should have been advised of his right to remain silent. 10 U.S.C. 831(b). He asserts that, while the district court emphasized the subjective belief of the investigators that petitioner was not a suspect, their subjective belief was not objectively reasonable. That fact-bound contention lacks merit.

The military judge found that neither of the agents who questioned petitioner "believed, *nor reasonably believed, nor should they have reasonably believed* that [petitioner] was a suspect on 2 June 1990," and that "no ground existed for them to believe that the accused was a suspect." Pet. App. 28a (emphasis added). The Army Court of Military Review likewise found that petitioner was not "*reasonably* suspected of killing PFC Ivon by the CID agents with whom he spoke on [June 2]." *Id.* at 59a (emphasis added). And the district court, after determining that the military judge's findings "support an honest belief on the part of the investigators that [petitioner] was not a suspect," added that "there was objective evidence in the record to support the agents' personal belief." *Id.* at 37a. Both the military courts and the district court thus concluded that the investigators' belief that petitioner was not a suspect was objectively reasonable in view of the available evidence.

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against applying a *de novo* standard, particularly in the military setting.

There is ample support for that conclusion in the record. By the time the agents interviewed petitioner, both Hestekin and Sparks had been taken into custody and had been identified as the principal suspects. Pet. App. 37a. The agents believed that petitioner had approached them voluntarily to assist them in the investigation. *Id.* at 59a. They also assumed that petitioner would supply incriminating evidence against Sparks, and petitioner did so by describing Sparks's troubled relationship with Ivon. *Id.* at 3a, 37a. While petitioner might have appeared nervous or agitated, his condition was reasonably attributable to the fact that his friend had been murdered. *Id.* at 37a. And although petitioner's statement that a third person had been in Ivon's car was not consistent with the gate entry log, the discrepancy was unknown to one of the agents and the other agent assumed that the gate entry log was in error. *Ibid.* The record indicates that additional evidence implicating petitioner had been uncovered by the time he became a suspect, and Hestekin's alibis had been verified. *Id.* at 24a-25a.[4]

b. Petitioner also contends (Pet. 25-28) that he was in custody on June 2 and thus was entitled to be advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner bases his argument on the assertion that he was ordered by the First Sergeant to meet with the investigators and was later escorted under

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[4] Petitioner relies (Pet. 22) on the fact that the agents took his clothing at the termination of the June 2 interview. As the district court found, however, that argument alone does not warrant granting habeas relief. Pet. App. 37a. Also, petitioner did not raise the argument in either of the military courts with factfinding authority, but instead raised it for the first time in the Court of Military Appeals.

guard to the River Building for further questioning. That fact-bound claim is without merit.

As the court of appeals correctly determined after reviewing the testimony in the suppression hearing, there is no basis for overturning the finding of the Army Court of Military Review that petitioner appeared before the agents voluntarily. Pet. App. 11a-13a. Although the First Sergeant had directed petitioner to meet with the agents after asking them whether they would like to see him, that happened only because petitioner had stated that he was with PFC Ivon before her murder and wished to inform the agents about it. *Id.* at 11a-12a. As for petitioner's suggestion that he was in custody because he was escorted to the River Building, petitioner simply was provided transportation to the River Building after he voluntarily decided to go there to continue his interview. *Id.* at 13a-14a. In fact, petitioner "himself does not appear to have testified that he felt compelled to go to the River Building." *Id.* at 14a.

c. Finally, petitioner claims (Pet. 19-21) that the investigators violated his rights under *Miranda* by continuing to question him after he requested counsel. As the court of appeals explained (Pet. App. 17a), however, the obligation to cease questioning on a request for counsel only arises if the subject is in custody. See, *e.g.*, *McNeil* v. *Wisconsin*, 501 U.S. 171, 178 (1991) (*Miranda* "requires * * * some statement that can reasonably be construed to be an expression of desire for the assistance of an attorney in *dealing with custodial interrogation.*"); *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981) ("*Miranda* * * * declared that an accused has a Fifth * * * Amendment right to have counsel present during custodial interrogation.").

Petitioner, as explained above, was not in custody when questioned on June 2.

d. For the reasons explained by the court of appeals (Pet. App. 14a-16a), any error concerning the admissibility of petitioner's statements on June 2 was harmless. Petitioner's statements simply acknowledged that PFC Ivon drove him and another soldier back to the base early that morning, and that he had last seen her at about 2:55 a.m. Those statements were no different from statements he made to other witnesses who testified at trial. *Id.* at 15a. On June 4 and 5, after being advised of his rights and waiving them, petitioner acknowledged that there was no third person in Ivon's car and admitted that he had stabbed Ivon to death while having sexual relations with her. *Id.* at 4a-5a.

Any violation of petitioner's rights in connection with his statements on June 2 would not affect the admissibility of the subsequent confessions. As this Court has explained,

> "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a subject has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."

Oregon v. *Elstad*, 470 U.S. 298, 314 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1588

IN THE

Supreme Court of the United States

MICHAEL TODD BROSIUS,

Petitioner,

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent offers no persuasive reasons why this Court should not grant Michael Todd Brosius's petition for a writ of certiorari and establish a uniform scope of review for military court-martial convictions. Respondent cannot deny and has not denied that the courts of appeal have developed a three-way split in their scope of review; Respondent attempts only to minimize the magnitude of that split and asserts that the magnitude does not justify this Court's review. Respondent has not asserted that this is an inconsequential issue for the nation because it clearly is of great moment. It is especially troubling that with a military that is as old as the Republic, and approximately a half century after *Burns v. Wilson*, the matter remains so unsettled. It is not enough to say that this is not the right case on which to resolve the split. The fact is that in this area, the United States will never have the "right case." Respondent argues that the lower courts properly determined that Brosius's claims do not justify habeas corpus relief. The lower courts did not analyze Brosius's claims under a *de novo* scope of review, however, and in any event, they — just like the Respondent here — sweep aside critical and undisputed facts that would be persuasive under that standard. Respondent's resort to the harmless error argument is unusual in a confession case and is the best indication that the Army's handling of this matter was an "error." Finally, the failure to address the ethical issue as anything other than harmless error shows that there is no acceptable explanation for the tactics employed here.

I. RESPONDENT DOES NOT DENY THE EXISTENCE OF A THREE-WAY SPLIT IN THE COURTS OF APPEAL.

Respondent makes no attempt whatsoever to deny that the courts of appeal have staked out three distinct methods of reviewing military convictions and that, accordingly,

results could differ depending only on the happenstance of where a military prisoner must seek review of his case. Indeed, Respondent expressly admits that the courts of appeal have "not produced a completely clear standard." Opp. at 11. These three methods of review are:

- In the D.C., Third, and Eighth Circuits, the courts review military cases in the same manner in which they review state court cases, Pet. at 10-11;
- In the First, Ninth, and Federal Circuits, the courts apply a *de novo* scope of review, Pet. at 11-12; and
- In the Fifth and Tenth Circuits, the courts initially apply the four-factor *Calley* test and then, if the four factors are satisfied, the courts apply a *de novo* scope of review, Pet. at 12-13.

With respect to the approaches used in the D.C., Third, and Eighth Circuits, Respondent reasons only that no split has yet developed *among these three courts*, because the D.C. and Eighth Circuits apparently have not had the occasion to decide whether AEDPA's new standards for reviewing state court convictions should apply to military cases as the Third Circuit decided here. Opp. at 13. In this case, it is quite clear that the Third Circuit used the 1996 AEDPA standards and applied a scope of review that is dramatically different from the federal courts' pre-1996 standards for reviewing state court convictions. Whether the D.C. and Eighth Circuits ultimately join the Third Circuit in its scope of review of military cases makes no difference. All of these courts have expressly stated that they review military convictions in the same manner they review state court convictions, and the Third Circuit's application of the very narrow 1996 AEDPA standard actually increases the magnitude of the split among the courts of appeal, regardless of whether the D.C. and Eighth Circuits join the Third Circuit. In this case, of course, the Third Circuit made no effort to explain why the AEDPA

standards should apply to military cases instead of the pre-1996 standards. This is a glaring omission, because the relevant AEDPA section on its face applies only to review of state court convictions and there is no expression of congressional intent to apply those standards to review of military cases. Indeed, the policy considerations as to the deference to be given to state court adjudications differ from those involving adjudications in the Armed Forces of the United States.

Respondent does not deny that the First, Ninth, and Federal Circuits use a *de novo* scope of review for military cases. For First Circuit cases, Respondent argues only that the court in *Allen v. Van Cantfort*, 436 F.2d 625 (1st Cir. 1971), performed its *de novo* review "briefly," and then leaps to the unjustified conclusion that the case "does not establish precedent for a *de novo* standard." Opp. at 12. Respondent makes no attempt to show why a "brief" *de novo* review does not establish *precedent* for a *de novo* review. If the First Circuit would have desired to perform a more restrictive review, it no doubt would have done so. Respondent also emphasizes that the Ninth and Federal Circuits developed their *de novo* standards while reviewing non-habeas cases seeking relief from court-martial sentences. Respondent does not disagree, however, that the courts use the same standards for reviewing military convictions regardless of whether the prisoner seeks review by way of a habeas corpus claim or some other claim. Pet. at 11 n.6.

Respondent also makes no effort to deny that the Fifth and Tenth Circuits use a hybrid approach, initially applying the four-factor *Calley* test and then — if the four factors are satisfied — applying a *de novo* scope of review. The effect of this approach is most evident in the Fifth Circuit's *Calley* case. After analyzing the four factors, *see* Pet. at 12, and determining that it would review the military conviction, the Fifth Circuit conducted an extensive *de novo* review of

those particular claims it believed were worthy of its consideration. *See Calley v. Callaway*, 519 F.2d 184, 203-28 (5th Cir. 1975).

In this case, the Third Circuit staked out the *most* restrictive of potential standards. The Third Circuit applied a 1996 statute concerning review of state court civilian cases with no indication that Congress intended the statute to apply to military convictions. Regardless of whether Todd Brosius — or any other military prisoner — ultimately is successful with his assertion of a habeas corpus claim, there is no reason why his case should be cast aside with such a narrow scope of review in Pennsylvania, where federal courts in Georgia, Maine, or Kansas (as well as numerous other jurisdictions) would apply a much broader scope of review.

II. APPLICATION OF A *DE NOVO* SCOPE OF REVIEW WOULD PRODUCE A DIFFERENT RESULT THAN THE THIRD CIRCUIT REACHED.

In addressing the merits of Brosius's claims, Respondent places undue emphasis on the factual aspects of those claims. *See* Opp. at 14 ("fact-bound contention" concerning whether Brosius was a "suspect" when he was interrogated); *id.* at 16 ("fact-bound claim" concerning whether Brosius was in "custody"). Apparently, Respondent is implying that Brosius is challenging the existence of historical facts or attempting to establish a *new* factual record to support his claims. We emphasize here, however, what we emphasized in the petition for certiorari and in the courts below: Brosius does not dispute any proper historical fact-finding. To the contrary, our position is that the undisputed facts clearly support his habeas corpus claim — especially under a *de novo* scope of review.

By referring to "fact-bound" claims, Respondent erroneously implies that there are no legal issues for this

Court or the lower courts to address, under a *de novo* scope of review or otherwise. That simply is not the case. Respondent does not deny that two issues central to this case are *legal* issues that courts routinely review *de novo*. "The determination of whether a person interviewed is a suspect is a question of law." *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999). Likewise, the issue of whether a person was in "custody" is a legal issue that court review *de novo* based on underlying facts. *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995). Underlying facts are necessarily intertwined with these issues, but in this case the factual record is undisputed.

Brosius adequately set forth in his petition for certiorari how courts applying a *de novo* scope of review would reach a different result from the conclusion that the Third Circuit reached here with its overly deferential AEDPA scope of review. We will not repeat that analysis here. Some issues and some of the Respondent's assertions, however, merit comment.

First, in reviewing the merits of Brosius' claims, this Court should remember one of the key aspects of *Burns v. Wilson*, 346 U.S. 137 (1953). Where the military courts do not dispose of claims "fully and fairly," the federal courts *are* entitled to "re-evaluate the evidence" in support of those claims. *Id.* at 142. Here, Brosius demonstrated in his petition for certiorari and in the courts below that the military trial judge openly speculated that outcome-determinative evidence existed in support of his legal conclusion that Brosius was not a "suspect" when he was interrogated. Pet. at 22-24. This alone establishes that the military proceeding was neither "full" nor "fair," and Respondent fails to address this issue.

Second, in addressing the merits of Brosius's claims, Respondent does not analyze how those claims would have been determined under a *de novo* standard. Instead, the gist

of Respondent's argument is that the lower courts properly decided the merits of these claims under the scopes of review that *they* applied. Respondent never denies that petitioners such as Brosius may receive different and more favorable treatment in jurisdictions other than the Third Circuit.

Third, Respondent erroneously states that Brosius raised one issue for the first time in the U.S. Court of Military Appeals — the undisputed existence of objective evidence (i.e., the seizure of his clothing) in support of his claim that he was a "suspect" when he was interrogated — and not in "either of the military courts with factfinding authority." Opp. at 15 n.4. However, Brosius *did* argue to the U.S. Army Court of Military Review that the seizure of his clothing — among other evidence — established that he was a "suspect." *See* Petition for New Trial, at 2-3, attached as Exhibit 5 to Exhibits in Support of Respondent's Response to Show Cause Order, filed in the District Court (Nov. 24, 1999).

Fourth, and most significantly, Respondent completely glosses over — indeed ignores — how the CID agents responded when Brosius made an unambiguous request for counsel. Their response, which the Department of Justice seems implicitly to condone here, was truly unusual and outrageous. Instead of providing counsel or, at the very least telling Brosius that he was not entitled to a lawyer as he requested, the agents deceived him into thinking that they were complying with his request by supplying the *prosecutor*, who had a previously-existing attorney-client relationship with Brosius and who then sat with Brosius during his interrogation. This is the conduct that brings Brosius's subsequent statements within the exception to the general rule of *Oregon v. Elstad*, 470 U.S. 298, 314 (1985). The agents *and this prosecutor* engaged in "deliberately coercive or improper tactics in obtaining the initial statement," *id.*, and subsequent statements — even those

obtained after rights warnings — are constitutionally inadmissible.

The undisputed facts, as summarized in the petition for certiorari, establish that Brosius is entitled to habeas corpus relief.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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